DECISIONS

OF THE

COURT

OF

SESSION,

From the Month of NOVEMBER

M, DCC, XXXV.

EDINBURGH:

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M, DCC, LVII.

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TO THE

READER.

IT has been regreted for ſome time paſt, that no particular Collection of the Deciſions of the Court of Seſſion, from *February* 1728 to *November* 1744, has hitherto been publiſhed; eſpecially as that is a period in which many remarkable Caſes occurred, tending to aſcertain ſeveral doubtful points in the Law of this Country. It was with a view to ſupply in part this Deficiency that the following Sheets were compoſed, from a parcel of printed Papers which occaſionally came into the Author's poſſeſſion. The Plan that he proceeded upon in executing the Work, was to collect ſome of the important Deciſions in that period, which either were not marked in the *Dictionary* at all, or merited to be more particularly obſerved than the Nature of ſuch a Performance could admit of: But with reſpect to ſuch as the learned Compiler thought fit to ſtate more fully than uſual, by ſpecifying the Defences and Anſwers, it was judged improper to comprehend any of theſe in this Collection.

As this was the general Plan obſerved in compoſing theſe Sheets, the Reader cannot expect to find here all the remarkable Deciſions, far leſs a regular Journal of the Proceedings of the Court, at this diſtance of time, and after ſo many late Alterations in our Law; ſuch a Work can ſcarcely be looked for. 50

IT

It ſeems neceſſary likewiſe to take notice, that the Interlocutors annexed to the following Caſes were extracted from a Day-book kept by the Gentleman who was appointed by the Faculty of Advocates to collect the Deciſions in that period: And, as this Journal appears to have been carried on with ſome degree of exactneſs (excepting in the two laſt years of that Gentleman's life, when his health would not permit him to give a regular attendance) no reaſon occurs why the ſame ought not to be credited: But whatever be in this, it was thought fit to mention the Fact, that the Public might lay on it the ſtreſs which ſhould be judged proper. In this Day-book ſome Points are marked as determined on Report of the Lords Ordinaries; and theſe Points are interſperſed in the Work, tho' the Author had no opportunity to ſee any of the Papers relative to them. Theſe muſt alſo be taken on the faith of this Diary.

DECISIONS
OF
The COURT of SESSION.

N° I. *November* 25. 1735.

Competition, the Creditors of *Robert Frog* with his Children.

A Diſpoſition to one in Liferent, and the Heirs of his Body naſcituri *in Fee, is conſtructed to import a Right of Fee in the Father.*

THE deceas'd *Bethia Dundas* did, for the love and affection ſhe bore to *Robert* and *James Frogs* her lawful oyes, ſons to the deceas'd *James Frog* her eldeſt ſon, and the other perſons after-named, "Diſpone certain houſes belonging to her in *Edinburgh* in favours of the "ſaid *Robert Frog* her eldeſt oye in liferent, and to the heirs lawfully to "be procreate of his body in fee; and, failing of him by deceaſe without "heirs of his body, to the ſaid *James Frog* her other oye alſo in liferent, "and to the heirs lawfully to be procreate of his body in fee; and, failing "both her ſaid oyes without heirs of their bodies, to *John Frog* merchant "in *Penſilvania* her ſecond ſon in liferent and the heirs of his body in fee; "which failing, to *Elizabeth Frog* her daughter in liferent and the heirs of "her body in fee; which all failing, to her own neareſt lawful heirs what-"ſoever."

In virtue of this deed, *Robert Frog*, who, at the date thereof, was about nine years of age, was infeft; and having thereafter contracted ſeveral debts, in order to pay his creditors, he entered into a minute of ſale as to part of the ſubjects contained in the diſpoſition; however, before executing thereof, it was objected, That the above ſettlement only conveyed a right of liferent to him, and therefore he had no power to ſell, the fee being diſponed *to the heirs lawfully to be procreate of his body*; and, it having been agreed of conſent that the ſame ſhould be diſcuſſed, it was urged, for the creditors of *Robert Frog*, that, where-ever a right is granted to a father in liferent and to the heirs of his body *naſcituri* in fee, the father is always underſtood to be fiar, if no other reſtriction is expreſſed, and his children are only deemed heirs of proviſion: to illuſtrate which, it was obſerved, that it is a principle of law, That a fee cannot be *in pendenti*, but muſt be ſettled upon ſome perſon exiſting at the time of the diſpoſition;

the reaſon of which maxim is, that it would be inconſiſtant with common ſenſe to ſuppoſe a property without a proprietor; and, if the contrary doctrine took place, many abſurdities would follow. Thus, if the *dominium directum* were allowed to be pendent, the vaſſal could not be entered; if the *dominium utile*, the ſuperior could not have a vaſſal; if the former proprietor had contracted debt, his creditors could not affect it, becauſe there was no perſon from whom it could be adjudged; beſides ſeveral others that might be mentioned. And, as this maxim has been conſidered as a fixed principle in law, it has followed, that parents, taking rights to themſelves, or others ſettling them upon them with ſubſtitutions to their children *naſcituri*, have promiſcuouſly made uſe of the words *fee*, *conjunct fee* or *liferent*; becauſe both theſe, when applied to the parents, behoved to have the ſame effect: for, as the children *naſcituri* could not poſſibly be veſted in the fee when they were not in being, the liferent provided to the parent is underſtood to be an *uſus fructus cauſalis* reſolving into a real fee, as the children were capable of no other right but a ſucceſſion to the fee after the father's deceaſe; and, tho' nominally deſigned fiars, from the nature of the thing, it could import no more but a proviſion of ſucceſſion. And in this manner has all our lawyers conſtructed ſuch ſettlements. Thus, Lord *Stair*, *tit. Inveſt.* ſays, Inveſtments taken to parents, and, after their deceaſe, to ſuch children and other perſons named, the parent is underſtood to be fiar and not liferenter, and the children and others to be heirs-ſubſtitute. Sir *George Mackenzie*, p. 172, likeways obſerves, That, if a father diſpones to children to be procreate, this will be conſidered only as a deſtination, and will not hinder the father to make poſterior rights or poſterior creditors to affect by diligence what is ſo diſponed. And, *Dirleton*, *tit. Fee. queſt.* 1. aſks, "Where is the fee of a ſum provided to hu-"ſband and wife in liferent, and to the bairns in fee." Shewing plainly, by the method he there propoſes to ſecure the children, that it is his opinion, that, in the caſe ſtated, the fee is in the father: beſides, this interpretation has been ratified by a variety of deciſions. See 9th *July* 1630, *Veitch*; 10th *February* 1672; *Weemyſs*, 4th *February* 1681, *Thompſon*. It is no wonder, therefore, after ſo many authorities, that the leiges have truſted to ſettlements expreſſed in that manner; and, that ſuch clauſes have been generally ſo underſtood, is evident by the excerpts produced from the records of Chancery; whereby it appears, from a variety of inſtances, that children have been ſerved heirs of proviſion to their parents who were only infeft in liferent and their heirs to be procreate of their body in fee.

In the *next* place, when the ſpecial circumſtances that attend this caſe are conſidered, it is by no means probable the granter deſigned to reſtrict her grandſons and the other children named to be liferenters, for the love of whom it is ſaid the deed was made, and that ſhe intended to give the fee to their children who were then unborn. 2*dly*, She diſpones to them very near in the order they would have ſucceeded to her by law; which therefore ought to be more extenſively interpreted in favours of the heirs at law. 3*dly*, If ſhe had intended to have given them a bare liferent, ſhe would have added the word *allenarly*; without which, in ſuch ſettlements, it imports an *uſus fructus cauſalis*. Beſides, ſeveral abſurd conſequences would follow from ſuppoſing the fee to be lodged any where elſe than in the perſon of *Robert Frog*: to make out which, the caſe was put, that he had died leaving iſſue of his body, who had eſtabliſhed the fee in their perſon;

perſon; and that, thereafter, they had failed, whereby the ſubſtitution in favours of *James* in liferent and his iſſue in fee came to take place. How could *James* make up a title to the liferent? it is unknown, in law, that a liferenter ſhould ſerve heir to a fiar; and yet, it is believed, he could not come at it otherwiſe. 2*dly*, Suppoſe none of the ſubſtitutes had children, and that the diſponer had left creditors who wanted to affect her lands, they behoved to have adjudged, not from *Robert* or the other ſubſtitutes, if they were liferenters, but from the diſponer's remoter heirs at law: nay, even the creditors of theſe remoter heirs could, while there was no nearer heirs exiſting of the body of theſe ſubſtitutes, adjudge the lands for their debts; ſince, if the property is ſuppoſed to be devolved on them, nothing could hinder their creditors to affect it: all which are conſequences neither tenible in themſelves or any ways conſiſtent with the meaning of the ſettlement.

To theſe arguments, it was anſwered for *Robert Frog*'s children. The maxim, That a fee cannot be pendent, is, like moſt other rules in law, ſubject to exceptions; and ſo many have occurred, that it ſcarcely merits the name of one, as appears from the following deciſions, 22d *February*, *Bruce*; 4th *February* 1726, Sir *Edward Gibſon*; 22d *February* 1724, *Douglas*. Beſides, the caſe of an *haereditas jacens* is likewiſe an inſtance that a fee may be pendent; but, granting the brocard ſhould take place, it does not apply to the preſent queſtion, *ſcil.* Whether a diſpoſition to a perſon in liferent of a certain ſubject is to be explained a diſpoſition in fee, contrary to the plain and obvious meaning of the words; which imports rights of a quite different nature. As to the quotations referred to, they do not come up to the point in diſpute; for the paſſage from Lord *Stair* does not ſpeak of infeftments taken to parents in liferent, but of infeftments in general to parents without adjection of the words *in liferent*. And, it is true, in ſuch a caſe, the parent is fiar, becauſe there is nothing to limit the right: but it is otherwiſe when the words *in liferent* are adjected; for then the right cannot be extended beyond the reſtriction. Neither is what Sir *George Mackenzie* obſerves any ways applicable; for the queſtion that he determines, is not of a diſpoſition made to a father in liferent, but of a diſpoſition made by a father to children *naſcituri*; which, he ſays, imports only a deſtination, not a preſent right denuding the father; which is true, but nothing to the purpoſe. And as to the quotation from *Dirleton*, he gives no opinion on the queſtion ſtated; but rather ſeems to think the fee would belong to the children: tho', for making this the clearer, he ſays, it would be better to take the right in truſt in the father's perſon for the behoof of his children. 2*dly*, No argument can be drawn from that caſe to the preſent; as a ſum in a contract of marriage is underſtood to be given *ad ſuſtinenda onera*: therefore it ought to receive a more benign interpretation in favours of the father than when the deed is a pure donation, ſuch as the preſent. Neither is the inſtance of children's having ſerved heirs to their fathers, who were only infeft in liferent, of any avail; ſeeing the opinion of an inqueſt can have no weight in determining a point of law; eſpecially when it is conſidered, that the deſign of ſerving, is only to cognoſce the propinquity. With reſpect to the particular circumſtances condeſcended on, they are of no force to induce a conſtruction contrary to the natural and legal import of the words. For, as to the *firſt*, The diſpoſition not only proceeds on the narrative of love and favour, but for other good cauſes and conſiderations: the import of

which

which is, that, as the two grandſons were infants, and her ſecond ſon in *Penſilvania*, of whoſe return ſhe had no hopes; therefore, it is probable, her intention was to ſecure the ſucceſſion to her daughter *Elizabeth*; yet ſo as thoſe, who, by the courſe of law, fell to ſucceed, ſhould have the benefit of a liferent, and their children the fee; with a view to which, the deed was deviſed in the manner it now appears, whereby none of the other heirs could prejudge the ſucceſſion of her daughter who was the *dilecta perſona*. As to the *ſecond*, it is true, that, when the ſucceſſion is ſettled in the legal order, it is reaſonable to interprete clauſes favourably; but then that favour is not to be uſed to wreſt words contrary to their genuine meaning. To the *third*, There was no neceſſity to add the word *allenarly* in order to aſcertain the import of the word *liferent*; the ſimple expreſſion of diſponing in liferent excluded the fee, eſpecially when the fee is expreſſly given to others. In the *laſt* place, as to the abſurd conſequences which, it is pretended, would follow from ſuppoſing the fee not to be lodged in the perſon of *Robert Frog*, it is anſwered to the *firſt*, That the different grants of the different liferents are not ſubſtitutions to the firſt liferent, but new grants of liferents; and therefore there was no neceſſity to make up any title to the prior liferenter, but only to prove that the former liferenter was dead, and that the condition of the ſecond liferent exiſted. To the *ſecond*, The gratuitous deed of the diſponer would not prejudge her creditors; ſeeing they might have adjudged the fee from any who was next heir.

The creditors replied, That, if there is any rule of law that can be ſaid to hold univerſally and without any exception, it is, that the property of a ſubject cannot be pendent, but muſt neceſſarily belong to ſome perſon; neither do the deciſions referred to on the other ſide prove the contrary. For, as to the *firſt*, it has been ſince over-ruled by the deciſion 2d *January* 1708, Lord *Montſtewart*. And, in the other two caſes, the reaſoning on both ſides plainly ſuppoſes the certainty of that principle; neither is the inſtance of an *haereditas jacens* an exception, ſeeing the apparent heir *ſuſtinet perſonam haeredis* even before his ſervice, he having the *jus haereditatis delatum* from the moment of his predeceſſor's deceaſe, altho' a ſervice is neceſſary to compleat his titles. With regard to the anſwers that have been made to the opinions of our lawyers they are no ways ſatisfactory: for, as to the paſſage quotted from Lord *Stair*, it is probable that he ſuppoſes the caſe where no more is given in expreſs terms to the father than a liferent; becauſe, if the fee were given to him, it could not be the ſubject of a doubt. And Sir *George Mackenzie*'s authority is directly in point; for the reaſon why a diſpoſition by a father to his children *naſcituri* does not denude him of the fee, is, that they are uncapable to take it, on account of their not exiſting at the date of the deed; which applies directly to this caſe, as the children were not in being when the diſpoſition was made. It is alſo obvious from *Dirleton*'s opinion, that he did not think the fee could be taken directly to children *naſcituri*; and therefore he propoſes to veſt it in the father for the behoof of the children, which there would have been no occaſion for, if it could have been done directly to the children themſelves. In the *next* place, as to the conjecture, that the ſettlement was intended to ſecure the fee to *Elizabeth*, it is without any manner of foundation; as there is not a clauſe in the whole deed from whence the diſponer's *praedelectio* of her can be inferred: and, if the granter's own word is to be credited, *Robert* is the *praedelecta perſona*, and *Elizabeth* the

the leaſt *delecta* of them all. Neither is the abſurdities that naturally follow from the conſtruction of this ſettlement by the children any ways removed; for, as to the *firſt*, the continued ſucceſſion of liferenters making up no titles by ſervice, but only by a proof of the death of the former liferenter, and the exiſtence of the condition of the ſecond liferent, is a novelty unknown in law, and without any foundation in the analogy of law. And, as to the *ſecond*, there is no ſort of anſwer made to it.

Duplied for the children, That, if this caſe was to be determined by a Jury, agreeable to the practice of other countries, there can be no doubt but the verdict would be in the very terms of the deed, *That Robert Frog has the liferent, and his children the fee:* for the whole of the arguments advanced by the creditors are founded upon this, That a fee cannot be pendent. As to which, it may not be improper to obſerve, that, if the diſpoſition had been to *Robert Frog* in liferent allenarly, it would not have been pretended that he was fiar; and yet there is not one ſingle argument drawn from the pendency of the fee in the preſent queſtion; but what would have applied with equal ſtrength to that caſe: therefore it muſt be evident, that either their principle is falſe or miſapplied. At any rate, it is a maxim that does not hold univerſally. Thus, for inſtance, by the civil law, *Venter mittebatur in poſſeſſionem propter ſpem naſcendi*, which would not have taken place, if the brocard had obtained univerſally. But, granting it was a rule, it does not concern the preſent queſtion; for, in law, it is common to give diſpoſitions and legacies under many different conditions; during the pendency of which, the diſponer, or his heir, is the fiduciary fiar. Now, to apply this to the point in iſſue: Suppoſe there had been no proviſion of liferent to *Robert Frog*, it is plain, that the diſpoſition, tho' pure, would have reſolved into a condition, *viz.* if *Robert Frog* had children, and, during the pendency thereof, if it is not admitted that the fee was pendent, it muſt have remained with the diſponer and her heirs at law fiduciary, for the behoof of the children, when they ſhould exiſt. Nor can it vary the argument, that the liferent is diſponed to *Robert Frog*; for, *tantum conceſſum, quantum ſcriptum.*

The Lords having conſidered the right granted by Bethia Dundas *to* Robert Frog *her grandſon, found, That thereby a right of liferent was only eſtabliſhed in the perſon of the ſaid* Robert; *and therefore that the creditors of the ſaid* Robert *have no intereſt in the price.*

But, on petition and anſwers, "They found *Robert Frog* to be "fiar, *&c.*"

N° II. *November* 26. 1735.

Crawford contra *Hamilton.*

An illiquid Claim is no ground for retaining a liquid Sum charged for, altho' the Illiquidation may be owing to the Charger's Fault.

COLLECTOR *Crawford*, having right to a debt due by *Hamilton* of *Grange*, charged him for payment thereof; who ſuſpended, upon this ground, that he had a claim for a ſhare of the executry belonging to the charger

at the deceaſe of his laſt Lady, who was the ſuſpender's mother by a former marriage; and therefore he ought to be allowed to retain in his hands the ſum charged for, until the charger account to him for his ſhare of his mother's executry, to whom he is decerned executor-dative.

Anſwered for the charger: The demand is new and unprecedented, that payment of a liquid claim ſhould be ſtopped upon pretence of an illiquid one; nor can any inſtance, it is believed, be given, where it was ever ſuſtained. And if the matter is thoroughly conſidered, neither compenſation nor retention has any place in ſtrict law; ſeeing every one ought to pay his debt, conform to the preciſe tenor of his obligation, without regard to the mutual claim he may have againſt his creditor. Accordingly, compenſation or retention is only admitted in thoſe countries where it is introduced by ſtatute, or where the *Roman* law prevails, and had no place with us before the act 1592, which allows debts *de liquido in liquidum* to be pled by way of exception. When this obtained, it was natural to admit thoſe claims by way of exception, tho' not liquid, if inſtantly performable; ſuch as relief of cautionry, and other obligations *ad factum præſtandum*. But, if the obligation be not inſtantly performable, or not liquid, which comes to the ſame, becauſe time is neceſſary for liquidation; there is no reaſon why a demand inſtantly performable ſhould be delayed on that account; and therefore, in ſuch a caſe, neither compenſation nor retention ought to be allowed. Beſides, it is a point eſtabliſhed in practice, That an illiquid claim cannot be pled by way of compenſation againſt a liquid debt: and, to ſuſtain it in the ſhape of retention, would be allowing the thing, changing only the name. It is true, that illiquid claims are admitted, where they are inſtantly offered to be liquidate by the charger's oath; which, no doubt, is competent here. But it would be extremely hard to ſtop payment of a liquid debt until the event of a compt and reckoning, which may be protracted for ſeveral years.

Replied: It is the charger's fault that the quantity of the executry due to the ſuſpender is not already liquid, ſeeing he has hitherto omitted to give in a condeſcendance thereof; which he alone can do, as the vouchers are in his own hands. If indeed the liquidation depended upon any other, the charger's reaſoning would be concluſive, That his liquid claim ſhould not be deferred on account of an illiquid ground of exception: but, where the vouchers are in his own cuſtody, and the proof in a great meaſure depends upon his own compt-books and oath, ſuch a caſe muſt ſurely admit of a different conſideration: ſo that the want of liquidation ſhould not be objected, as it ariſes from an act which the charger is obliged to perform, but which he has hitherto declined to do. The maxim therefore ſhould take place here, That *pro facto habetur per quem ſtetit quo minus fieret.*

The Lords found the letters orderly proceeded.

N° III.

N° III. *December* 3. 1735.

Competition, *Thomas Lowrie*, and the other Creditors of *David Maclelan*, with *James Burns* Aſſigny to certain Jonrneymen Wrights.

Workmen have no real Right or Preference to other Creditors, on account of their Reparations done to a Houſe.

David Maclelan, proprietor of a houſe at the head of the *Cowgate*, employed ſome journeymen wrights to repair it, and thereafter he diſponed the ſame, under reverſion, to the ſaid *Thomas Lowrie*; in which he was infeft, for relief of ſome obligations in which he was engaged as cautioner with him. *Maclelan* having ſoon thereafter failed in his circumſtances, his creditors adjudged, and, among the reſt, theſe journeymen wrights for ſome wages due to them. In a ranking of the creditors, *James Burns*, as aſſigny to the journeymen, craved to be preferred on the ſaid tenement. And the topicks upon which he founded the preference, were, That the ſubject was meliorated by their labour; conſequently they ſhould be preferable for their wages both to *Lowrie* and the other adjudgers, ſeeing the repairs were *in rem verſam* of the creditors; as they could have had no fund or hope of payment, if the houſe had been allowed to go into diſrepair. As therefore the other creditors are *locupletiores* by their labour, it is but agreeable to the principles of juſtice and equity, that they ſhould be preferred, conform to *L.* 1: and *L.* 3. § 2. *de in rem verſ. Stair*, *B.* 1. *tit.* 8. § 6. and 7. Neither ought it to make any difference, that *Maclelan* was their employer, ſeeing the ſubject itſelf was diſponed to *Lowrie* during the time they wrought: ſo that it was properly work wrought for his behoof. Thus, in the caſe of a maſter-maſon or wright employing journeymen in a piece of work he had undertaken, the journeymen would have action both againſt their employer and againſt the proprietor. In the *ſecond* place, it was pled, That *Lowrie* having obtained a warrant from the Dean of Gild court to repair part of the houſe, and for which repairs he was preferable to the other creditors, of conſequence they ſhould be preferable to him, as having made theſe reparations, which he as proprietor might have been decerned to make by the 6th *act parl.* 1. *Seſſ.* 3. *Ch.* II. And if they were preferable to *Lowrie*, who had an heritable right to the ſubject, of courſe they behoved to be preferable to the other creditors.

On the other hand, it was argued for *Lowrie*, *&c.* That the work's being profitable for them can create no preference to real creditors upon an heritable ſubject; ſeeing that would reſolve into a tacite hypotheque, which the law reprobates. Nay, even ſuppoſing they had lent money or furniſhed materials wherewith the houſe was built, it could afford them no preference thereon by the law of *Scotland:* and, if the civil law were to have any influence, it could not vary the argument, as it gives no privilege to workmen on a building for their work. Beſides, if it were to take

take place in this caſe, ſeveral of the creditors, who lent their money to *Maclelan* to pay the tradeſmen, would be preferable to theſe journeymen. But, in reſpect that hypotheques were extended by the *Roman* law further than is agreeable to our practice, therefore they have not claimed any preference on that account. And, if tradeſmen had a preference upon a houſe for their wages, a purchaſer might be liable to pay the price a ſecond time, if any of the workmen chanced not to be paid up.

As to the pretence, that the reparations are *in rem verſam*; that can only be the ground of a perſonal action againſt the employer, but cannot affect ſingular ſucceſſors, or afford any real right on the ſubject.

To the *ſecond* ground of preference, it was anſwered, That the reaſon why repairs made in a houſe, in virtue of the Dean of Gild's warrant, has a legal preference, is founded on a preſumed contraction betwixt the Dean of Gild and the repairer, that he ſhall have a pledge for his reimburſement. An expedient introduced into our law, *ne urbs ruina deformetur*, but that can noways avail the journeymen, who wrought upon the faith of *Maclelan*, without relying on the ſubject.

The Lords preferred Lowrie *to the journeymen.*

N° IV. *December* 9. 1735.

John Blair contra *Alexander Sutherland* of *Kinminity*.

Preſcription.

Patrick Sutherland of *Clynie* granted a bond, to *Thomas Roe* merchant in *Edinburgh*, payable at *Martinmaſs* 1690; who, by a general diſpoſition in *January* 1695, made over all his effects in favours of *Hugh Blair*, alſo merchant there, for the behoof of himſelf and the other creditors of the diſponer: however he never made up any title thereto. But, in *February* 1695, it appears, that he had obtained a ſignature or warrant for expeding a gift of *Roe*'s ſingle eſcheat; and, upon *Hugh Blair*'s death, the ſaid *John Blair*, his ſon, was, in *May* 1703, confirmed executor, *qua* neareſt of kin to him. And, in the year 1730, he brought an action for payment of the bond againſt *Kinminity*, as repreſenting *Patrick Sutherland*, the debtor, upon one or other of the paſſive titles; libelling, in the ſummons, his intereſt in the debt, thus: *As executor to the deceas'd Hugh Blair, who was donator to the eſcheat of the deceas'd Thomas Roe the creditor in the bond.* Againſt this proceſs, ſeveral defences were proponed; whereby it continued in dependance till *June* 1735: when it was objected, 1*mo*, That the principal ſum and annualrents of the bond, after the denunciation of the ſaid *Thomas Roe*, were preſcribed; becauſe the ſame fell not within the purſuer's title libelled on, being only that of an *Executor to a donator of eſcheat*. 2*do*, As to the annualrents due, preceeding the denunciation, and which might have fallen under the gift, the proceſs behoved alſo to be ineffectual as to theſe; ſeeing it never was expede.

Anſwered

Anſwered for the purſuer: That the objection to the gift of eſcheat is good; and it was a miſtake to found upon it: but, with reſpect to the preſcription of the bond itſelf, and annualrents due thereon, after the denunciation; the preſcription was ſufficiently interrupted, in ſo far as this libel not only narrates the purſuer's right as executor to his father *Hugh Blair*, donator to *Roe*'s eſcheat, which is acknowledged to be an inſufficient title; but it likeways mentions the purſuer's confirmed teſtament to his father, as giving him a right to the bond in queſtion. In which teſtament, the above general diſpoſition is particularly ſpecified, as the chief foundation of his father's right. And which teſtament was given out with the proceſs to the defender in *November* 1730.

Replied: That the diſpoſition itſelf is preſcribed, counting from its date in *January* 1695 till *June* 1735, the firſt time it was either produced or founded upon. Neither can the overly manner in which it is uſed in the teſtament preſerve it from preſcribing; ſeeing the way how it came to be mentioned in the teſtament was, that, in giving up an inventary of the ſums due to *Hugh Blair*, a debt due by Captain *Francis Charteris* is ſpecified; and to which ſum it is therein ſaid, that he had right, not only by the above diſpoſition from *Roe*, but likeways in virtue of a decreet againſt the ſaid Captain *Charteris*. As this is the fact, it can with no propriety be ſaid to be founding on the general diſpoſition, as a title in this proceſs to the ſaid bond; ſeeing it is only occaſionally named in the teſtament, as what gave *Hugh Blair* a right to the debt originally due by Captain *Charteris* to *Roe*. But, ſuppoſing it had been libelled upon expreſsly, it would have been no ſufficient title to maintain an action, or obtain a decreet for this debt; as the purſuer has not confirmed the total right of the diſpoſition to his father, ſo as to put himſelf in his place: and, even ſuppoſing that had been done, it would ſtill have been requiſite to do what was incumbent on his father, namely, to confirm the ſame upon his general diſpoſition as executor-creditor to *Roe*. All which having been neglected, the ſame cannot now be done, as the debt is preſcribed. And as no compleat title was made up to this bond within the forty years, the citation in this proceſs cannot ſerve to interrupt the preſcription. See Lord *Stair*, *p.* 359. But whatever would have been the conſequence of expreſsly libelling upon the general diſpoſition, yet in fact it is not done in the preſent caſe; ſeeing the libel aſcribes the purſuer's right to a quite ſeparate and diſtinct title, *ſcil.* to his being *executor confirmed to a donator of eſcheat*; which being acknowledged to be a title which is good for nothing, he ſhould not, after the elapſe of forty years, be allowed to produce and reſort to a ſeparate right to the debt, in order to ſave it from preſcription; which, tho' good when this proceſs was firſt commenced, is now cut off by preſcription; as it is a certain principle in law, That where there are different rights to a debt, diligence done upon one of them will not ſerve to interrupt the preſcription againſt the others; as each muſt ſtand or fall according as diligence has been uſed or not. Thus a bond bearing annualrent, which had belonged to a wife whoſe huſband died forty years ago, tho' ſhe or her repreſentatives had purſued or obtained payment thereof, it would not follow, that the executors of the huſband could, after forty years, purſue for the annualrents that fell under the *jus mariti* before that time. In the ſame manner, an action brought at the inſtance of one calling himſelf *executor to a donator of eſcheat*, ſuppoſing the title to have been good, cannot ſave from preſcription a ſeparate and diſtinct title to the

debt itſelf. See 1ſt *February* 1684, *Colſton*; 11th *February*, and 22d *June* 1681, *Kennoway*; *Roſs* of *Folly* contra Duke of *Gordon*, *anno* And this doctrine applies with greater force, ſince the act of ſederunt 1723; which appoints all ſummonſes to be fully libelled, and a copy thereof given to the defender, with certification; that he ſhall not be oliged to anſwer to more than what is contained in the copy; conſequently, where one partial title is libelled, as in this caſe, it is to that only the defender is obliged to come prepared to anſwer.

Duplied for the purſuer: The uſing the diſpoſition as the foundation of the teſtament, is a plain interruption of the preſcription, ſufficient to intitle any perſon having a right thereto, to found on it as a valid title to the bond, any time within forty years after ſuch document, provided the bond itſelf remains unpreſcribed. And, ſuppoſing it were admitted not to be a document taken thereon (the defender not having been ſpecially called to the confirmation;) yet, as the libel mentions the teſtament which recites and is founded on the ſaid general diſpoſition, that is a ſufficient interruption of the preſcription from the citation in this proceſs, altho' the diſpoſition was not expreſſly named in the libel; ſeeing, from the time of giving out the teſtament, the diſpoſition muſt be conſidered as making part of the purſuer's ground of claim; and thereby judicially notified to the defender as much as if it had been expreſsly ſet forth in the libel. And indeed it would be a very great extenſion of the doctrine of preſcription, to find, that a writing, mentioned in the deeds recited in the libel, and which was the only foundation upon which they could be made effectual, ſhould become void by preſcription during the dependence of the proceſs founded on ſuch libel: ſo that the argument pled for the defender, anent the neceſſity of libelling on the true grounds of debt, in order to ſave them from preſcription, does not apply to the preſent queſtion; where the pretended defect in the particularity of the libel is ſo fully made up; more eſpecially conſidering ſuch a doctrine is contrary to the principles both of the civil and municipal law of this kingdom, as appears from law, 3d *Cod. De Annali Excep. Si quis obnoxium ſuum in judicium clamaverit, et libellum conventionis ei tranſmiſerit, licet generaliter nullius cauſae mentionem habentem, vel unius quidem ſpecialiter, tantummodo autem perſonales vel hypothecarias continentem; nihilominus videri jus ſuum omne eum in judicium deduxiſſe, et eſſe interrupta temporum curricula, cum contra deſides homines et juris ſui contemptores odioſae exceptiones propoſitae ſunt.* See Lord *Stair*, *tit. Preſcription*, *parag.* 26.; and *July* 26. 1637, *Lawers*. As to the deciſions quoted for the defender, it is anſwered in general, That they all relate to the preſcription of inhibitions, from which no argument can be drawn to the caſe of obligations, aſſignations, *&c.*; ſeeing inhibitions produce no effectual action againſt the debtor, but only againſt third parties.

Neither is the argument drawn from the act of ſederunt of any force, as the terms of it are here fully complied with by libelling on the bond and teſtament. Beſides, the certification in the ſaid act is not, That a ſummons, imperfectly libelled, ſhall not interrupt preſcription; but that the defender ſhall not be obliged to anſwer to more than what is contained in the copy given to him: but ſtill it will ſerve as a good interruption of the preſcription. And, as to the obſervation, That no legal title having been made up to this bond within the forty years, the citation in this proceſs cannot ſerve to interrupt the preſcription;

It is *anſwered*: There was no occaſion for *Hugh Blair*'s confirming to *Roe* in order to give him an active title to purſue, ſeeing it is a point eſtabliſhed, That a general diſpoſition is ſufficient, the diſponee confirming before extract; which, tho' it has not hitherto been done, yet that is what he can ſtill do, as the citation, at his inſtance, who had ſuch a right, muſt ſtop the preſcription's taking place.

To which the defender *triplied*: The doctrine, That libelling upon one title to a debt, does not ſave a ſeparate one from preſcribing, is well founded, notwithſtanding of *Juſtinian*'s conſtitution in the law, quoted; as it eſtabliſhes a principle, the reaſon whereof may be juſtly doubted. The creditor, in that caſe, might have got a privilege of declaring which of the debts due to him he meant to inſiſt for: but, that an action, *e. g.* for payment of a hundred pounds, ſhould ſerve to interrupt the preſcription as to five different claims for a hundred each, does not appear to have a very ſolid foundation. Beſides, *Pereſius*, in his Commentary upon that title, obſerves, That the law concerns a particular caſe. In the *next* place, there is nothing ſolid in the argument, That the general diſpoſition is in effect libelled upon in this proceſs; as it does not appear from the teſtament, that the diſpoſition contained a general aſſignation of all debts due to *Roe*, or that particularly comprehended the bond in queſtion. And, if it was impoſſible to diſcover that from the teſtament, How can it be maintained that this libel proceeded upon the diſpoſition, or was a document taken thereon, or upon a debt that fell under the conveyance thereof?

The Lords found, That the bond was not preſcribed.

But, upon petition and anſwers, *They ſuſtained the defence of preſcription.*

N° V. *December* 18. 1735.

M'Queen contra *Stirling* of *Keir*.

1. *An Heritor, poinding upon a Baron-decreet for bygone Rent, needs not wait the Elapſe of the ordinary Days.* 2. *Meaning of the Words of ſuch a Decreet, decerniug to pay within the Terms of Law.*

UPON the 19th *September* 1734, *Keir* took a decreet before his baron-court againſt *M'Queen* his tenant; whereby he was decerned to make payment to him of a certain ſum, as bygone rents, *within the term of law*. And, in virtue thereof, *Keir* pointed his effects on the 24th of the ſaid month; whereupon *M'Queen* brought an action of ſpulzie: againſt which the defence offered was, lawfully poinded.

Anſwered for the purſuer: That his goods were carried away before the term of law, within which he was charged to pay, was expired.

Keir replied: That antiently a cuſtom prevailed of poinding inſtantly after obtaining decreet, either without any charge at all, or before the days were expired, not only for tenants reſts, but likeways for all perſonal debts; which being deemed a hardſhip, gave riſe to the act 1669: whereby it is enacted, *That it ſhould not thereafter be lawful to poind moveables upon decreets for perſonal debts, while the parties be firſt charged, and the*

the days of the charge be expired. And then it is added: *But prejudice always of any decreets, recovered at the inſtance of heritors againſt their tenants in their own court, whereupon it ſhall be lawful to them to uſe poinding as formerly.* Which act is not only a proof that the old cuſtom of poinding upon baron-decreets was preciſely as he pleads it; but it likeways imports an approbation of that privilege which heritors had been ſo long in poſſeſſion of: therefore it was lawful for him to poind immediately after the decreet: neither can the decerning *M'Queen* to pay within the term of law, make any variation; ſeeing that means nothing elſe but the time when a decreet may be put to execution, which cannot be fixed to any preciſe number of days, but muſt vary according to the nature of the decreet on which execution is to proceed. Thus, in charges on decrees before the Court of Seſſion, the term of law is fifteen days; but, upon decrees of regiſtration of bills, it is only ſix; and, on baron-decrees, it is *inſtanter*; becauſe they may be put immediately to execution: So that granting he had charged upon a preciſe number of days, and poinded before they had expired, it is believed, the above ſtatute would have warranted him in ſo doing.

Duplied for the purſuer: That no ſentence upon a perſonal debt can be execute until a certain ſpace determined by law be elapſed; which with us being fifteen days (except where a ſhorter time is ſpecified) all executions within that period are illegal. And this is founded not only on the principles of natural equity, that require an indulgence of ſome time betwixt the pronouncing and executing a ſentence, but likeways in the above ſtatute: it is true, that it contains an exception of decreets recovered by heritors againſt their tenants in their own courts, upon which it is declared, that poinding may be lawfully uſed as formerly. The meaning whereof is not to allow heritors the privilege of executing the ſentences of their own courts without abiding any term, but only to declare that ſuch ſentences may be execute without a formal antecedent charge, conform to the cuſtom in other courts; which is very reaſonable, conſidering that the officers thereof are not preſumed ſo ſkilled in matters of form, as they are in other courts. And, that this was underſtood to be the meaning of the law at the time it was made, is plain from Lord *Stair's Inſtitutions, p.* 729. where he ſays, That, in all decreets, as well thoſe of baron-courts as others, there ought to interveen fifteen days betwixt the pronouncing the decreet and the execution thereof; that, in the mean time, parties may either pay or apply for a ſuſpenſion. Beſides, it is very extraordinary to ſuppoſe the law ſhould indulge ſuch a privilege to baron-courts, where there is more opportunity of oppreſſing poor people, than in any other; eſpecially as no good reaſon can be given why tenants, who, by law, are intitled to many privileges, ſhould not have the legal *induciæ*, which is competent to the reſt of the ſubjects.

But, in the *ſecond* place, whatever is the privilege of baron-decreets, it cannot be extended to this caſe; ſeeing, by the decreet, he was expreſsly ordained to make payment within the term of law; whereby he had reaſon to believe, that, provided he paid within fifteen days, he was ſafe from all execution: notwithſtanding of which, his effects were carried off within that period. And, the conſtruction put upon the decreet by the defender, is inconſiſtent with common language; as the term of law is always ſuppoſed to imply a certain number of free days.

Triplied:

Triplied: That, before the ſtatute 1669, poindings, in all caſes, proceeded ſummarily without the neceſſity of a charge; and, even where a horning was raiſed and execute before the days thereof expired, as is obſerved both by *Balfour*, in his *Practiques*, and Sir *George Mackenzie*, in his *Obſervations* on this ſtatute. Beſides, the act 1469, *ch.* 35. which prorogates the poindings for rents, due at *Whitſunday* and *Martinmaſs*, to the third day after thoſe terms, in reſpect the poinding at the term-day occaſioned a profanation thereof (both which were then holydays) is a demonſtration that poinding was then competent immediately after decreet; nay, it has been found, That, in matters which do not concern poindings, the law ſtands upon the ſame footing it did before the act 1669. Thus, a decreet of removing before an inferior court may be put to execution by ejection immediately after it is pronounced; and, if the law ſtood ſo before the act, the defender has done nothing wrong; ſeeing, at the ſame time, that the ſtatute diſcharges poinding for perſonal debts until the days of the charge be expired: it expreſsly excepts decreets recovered at the inſtance of heritors againſt their tenants in their own courts. As to the paſſage quotted from Lord *Stair*, it is at beſt very ambiguous and inaccurately expreſſed. In the *ſecond* place, the defender cannot admit the gloſs that is put on the decreet; namely, that it imports the ſame thing as if the purſuer ſhould pay within fifteen days; ſeeing the term of law, in its proper, as well as its legal ſenſe, ſignifies the term within which execution may be awarded; and therefore cannot be underſtood to give any other *induciæ*, than were allowed by law in this particular caſe.

The Lords repelled the objection to the poinding, and aſſoilzied.

N° V. *January* 2. 1736.

Procurator-Fiſcal of *Edinburgh* contra *Archibald Campbell.*

1. *If a Riot or Injury, which can only be proved by Oath of Party, is competent to be purſued by the Fiſcal alone.* 2. *Are Expreſſions that imply a Challenge to fight probable by Oath, if the Libel is reſtricted to a pecuniary Mulct?* 3. *Can a Defender in one Court be adduced by the Purſuer as a Witneſs in another to prove the ſame Allegations?*

IN the proceſs at the Fiſcal's inſtance againſt the ſaid *Archibald Campbell*, before the Bailies, for a riot alledged to have been committed by him againſt *James Stewart*; the libel ſet forth, "That the Defender did, at "the Croſs of *Edinburgh*, aſſault the ſaid *James Stewart*, calling him by "opprobrious names, did ſpit in his face, and deſired him to reſent it if "he durſt, publicky in preſence of ſeveral perſons there conveened; "which expreſſions, the libel adds, have no other meaning, than a chal-"lenge to Mr. *Stewart* to fight him the defender."

For *Campbell* it was *pled*, That, if he uſed Mr. *Stewart* in any diſreſpectful manner, it was upon great provocation received; he having, on many occaſions, propagate the groſſeſt and falſeſt calumnies againſt the defender, tending not only to deſtroy his credit as a merchant, but likeways to defame his private character; particular inſtances wherefore were condeſcended on.

When this cauſe came to be adviſed, the Bailies found the libel relevant, and admitted the ſame to proof; but, at the ſame time, ſuſtained it relevant, for alleviation of the offence libelled, that Mr. *Stewart* had defamed the defender in the way and manner ſet forth in the defence: whereupon a diligence was granted to both parties for proving.

When this proof came to be adviſed, the Fiſcal reſtricted the concluſion of the libel to a pecuniary mulct, and referred the ſame to the defender's oath of verity; which the Bailies found relevant; and, upon his declining to depone, he was held as confeſs'd.

However, after proteſting that he did not acquieſce in the interlocutor, he craved a ſecond diligence to compel ſome witneſſes to appear for further proof of his defence; producing, at the ſame time, an execution on the firſt diligence againſt thoſe who had not appeared; which being refuſed, he thereupon offered a bill of advocation, upon the following grounds.

1*mo*, That the Bailies had committed iniquity, in not allowing him a ſecond diligence for proving his defence, agreeable to the practice of the Court, which was offered to be proven; and which they ought to have granted, ſeeing this proceſs could not be compared to a trial by a Jury, where all the proof muſt be brought in their preſence at one diet, and where a pannel has compulſitors given him of the nature of firſt and ſecond diligences at once; by which, if he apprehends any of the witneſſes to be refractory, he may compel them to attend at the diet appointed for the trial. But here there was no means to compel the witneſſes to compear at the firſt citation; wherefore he ought ſtill to be allowed to bring further evidence of his defence, and, if neceſſary, even to cite Mr. *Stewart* himſelf as a witneſs to prove it. 2*do*, They did wrong in finding that his oath was a relevant mean of proof; as the giving of a challenge to fight, albeit no fighting enſue, is puniſhed with baniſhment and eſcheat of moveables by the act 1696. And the libel here ſets forth, That he affronted Mr. *Stewart*, and then he deſired him to reſent it if he durſt; which expreſſions, it avers, have *no other meaning than a challenge to Mr.* Stewart *to fight him.* Therefore his oath could never be competent, if the fact libelled was relevant to infer ſuch a puniſhment. 3*tio*, The Fiſcal was not intitled to proſecute and refer to oath an injury which could not be proved by witneſſes, when the party ſaid to be injured was not complaining; ſeeing his ſilence is an evidence that either the fact is not true, or that he has ſeen cauſe to paſs it over, and be reconciled to the aggreſſor; eſpecially conſidering that it may be attended with ſeveral bad conſequences, if fiſcals were encouraged in ſuch proſecutions, as it would tend to publiſh injuries, which perhaps all parties inclined to conceal.

To the *firſt* reaſon of advocation, it was anſwered, That the procedure of the Magiſtrates in this proceſs was agreeable to their regular courſe in matters of riot; and, if there are any inſtances to the contrary, they ought not to be drawn into example or followed in this caſe; where, from the proof already adduced by *Campbell*, there is no reaſon to expect any further light can be got in this affair. And, altho' it is not a trial by Jury, yet the uſual rules of evidence muſt be obſerved: one neceſſary circumſtance whereof is, to prevent witneſſes from knowing what each other depone; which cannot be done, if examinations in a public court were to be permitted at different diets. And with reſpect to the demand of being allowed to cite Mr. *Stewart*, it ought not to be yielded to; ſeeing it is informed, that *Campbell* has brought a proceſs againſt him before the commiſſary-

miſſary-court, founded upon the very ſame allegation on which he grounded his defence before the Magiſtrates. The fact ſo ſtanding, he cannot demand Mr. *Stewart*'s oath as a witneſs in one court, and, upon the ſame fact, bring a proof by witneſſes in another juriſdiction, when both proceſſes are depending at the ſame time.

As to the *ſecond*, Whether it is competent to prove the libel by *Campbell*'s oath, it was anſwered, That, by the 7th article of the inſtructions to the Juſtices of the peace, as contained in the 38th act of the Parliament 1661, ſuch riots may be proved by the defender's oath, eſpecially as the libel is now reſtricted, of conſent, to a pecuniary mulct. And it is only direct, not implied challenges to fight, that is puniſhed by the ſtatute with baniſhment and eſcheat of moveables; if it were otherways, that puniſhment might be extended very far. With reſpect to the *third*, The concourſe of the injured party is unneceſſary, as appears from the 7th article of the ſaid Inſtructions: beſides, it is pretty extraordinary to ſuppoſe the law would leave the preſervation of mankind from injuries and violence to the diſpoſitions they may or may not have to proſecute wrongs done them.

The Lords found, it was competent to prove the libel by Campbell's *oath; and alſo that Mr.* Stewart *might be adduced as a witneſs.*

N° VI. *January* 8. 1736.

Janet Sinclair contra *John Sinclair* of *Rottar.*

A Son poſſeſſing an Eſtate without making up any Title thereto, in which his Grandfather died infeft, is not liable to his Father's Creditors upon the Act 1695, *the Father having died in a State of Apparency, after being more than three Years in Poſſeſſion.*

BY contract of marriage betwixt the deceas'd *John Sinclair* of *Rattar* and the ſaid *Janet*, he provided her, in caſe ſhe ſurvived him, to the liferent of certain lands, which he continued to poſſeſs many years; but died without making up any titles thereto.

Whereupon ſhe brought a proceſs againſt the ſaid *John Sinclair* her ſon, in order to make the proviſions in her contract effectual; and inſiſted particularly on the paſſive title introduced by the act 1695, her huſband having been more than three years in poſſeſſion.

Pleaded for the defender: The above act can give the purſuer no aid; ſeeing it provides only for the creditors of the interjected apparent heir, where the next heir ſucceeds to the remoter predeceſſor, either by ſerving heir to him, or by adjudication on his own bond: but the defender is not in either of theſe caſes, in ſo far as he has not ſerved heir to the remoter predeceſſor; neither does he poſſeſs the eſtate upon an adjudication on his own bond. And, the ſtatute being correctory of our common law, cannot be extended from the caſes ſpecially mentioned to others that are omitted.

Anſwered

Anſwered for the purſuer: Her action is well founded, both on the firſt and ſecond clauſes of the act, whether they are conſidered ſeparately or jointly. And, with reſpect to the firſt, which ordains, *That, if any man ſhall ſerve himſelf heir, or by adjudication on his own bond, ſucceed not to his immediate predeceſſor, but to one remoter; as paſſing by his father to his grandfather, or the like; then, and in that caſe, he ſhall be liable for the debts and deeds of the perſon interjected, to whom he was apparent heir, and who was in poſſeſſion of the lands and eſtate to which he is ſerved for the ſpace of three years, and that in ſo far as may extend to the value of the ſaid lands and eſtate, and no farther.* Now, tho' this clauſe mentions only the next heir ſucceeding to the remoter predeceſſor by ſervice or adjudication, theſe being the ordinary methods of heirs making up titles to their predeceſſor's eſtate; yet that does not exclude the caſe, where the next heir bruiks the eſtate by other titles authorized by law, or without making up any whatſomever; ſeeing the titles ſpecially mentioned are only intended to exemplify the ſtatute, which muſt be underſtood in the moſt extenſive ſenſe, ſo as to comprehend all the caſes, where the next heir poſſeſſes the eſtate of which the interjected apparent heir was three years in poſſeſſion, in order that he may be liable to the debts and deeds of the interjected perſon to the value thereof; ſeeing what the law intended to prevent was the frauds committed againſt creditors upon the deceaſe of their debtors, thro' the contrivance of apparent heirs; and the ſpecific fraud this act had in view to remedy, was, that heirs not only refuſed to repreſent the interjected apparent heir, but carried off the eſtate to the prejudice of his creditors, by entering to the remoter predeceſſor: to remedy which it provides, That the heir, in ſuch caſe, ſhall be liable to the deceas'd apparent heir's debts who was three years in poſſeſſion; and which muſt take place, whether the next apparent heir renounces to be heir to the interjected perſon or not, or whether he paſſes by him expreſsly, by ſerving heir to the remoter predeceſſor, or tacitely, by poſſeſſing as apparent heir to the remoter predeceſſor; ſeeing that muſt be conſtructed, in the eye of law, a paſſing by the interjected; as it is obvious, that the next apparent heir, who refuſes to pay the interjected perſon's debts, muſt acknowledge that he poſſeſſes upon ſome title or other, and the only one that his poſſeſſion can properly be aſcribed to, is the right of the predeceſſor who ſtood laſt infeft, which is plainly a paſſing by the interjected perſon.

In the *next* place, it is obſervable in this clauſe, That the perſon interjected is not only called predeceſſor to the next heir, who, paſſing by him, ſerves heir to the remoter predeceſſor, but likeways ſuch next heir is ſaid to be apparent heir to the perſon interjected; wherefore the interjected perſon, who, after poſſeſſing the eſtate three years, died in a ſtate of apparency, is, by this law, deemed predeceſſor, and the next heir eſteemed apparent heir to him in the eſtate ſo poſſeſſed, tho' he never make up a title thereto, and that in order to ſubject him to the deeds of the interjected perſon; conſequently the defender's poſſeſſing his grandfather's eſtate (who died in the fee thereof) as apparent heir to him, muſt, by the intendment of the ſtatute, be eſteemed as poſſeſſing the eſtate of his father, the interjected perſon, in order to ſubject him to his debts.

And, tho' this action is well founded on the firſt clauſe, yet it receives additional ſtrength from the ſecond: which ſtatutes, *That, if any apparent heir for hereafter ſhall, without being lawfully ſerved or entered heir, either enter to poſſeſs his predeceſſor's eſtate, or purchaſe the ſame, or rights affecting the ſame, otherways*

therways than as the higheſt offerer at a public roup, without colluſion, his foreſaid poſſeſſion or purchaſe ſhall be repute a behaviour as heir, and ſubject him to all his predeceſſor's debts and deeds, as if he were ſerved and entered heir to him.

Now, tho' the principal deſign of this clauſe ſeems to reſpect the creditors of the predeceſſor who was laſt infeft, yet it muſt likeways be underſtood to give a ſecurity to the creditors of the interjected apparent heir who was three years in poſſeſſion; as it expreſsly declares the apparent heir's poſſeſſing, upon any other title whatever, other than as higheſt bidder at a public roup, to be equivalent to an actual ſervice in the lands; conſequently the defender's poſſeſſing his grandfather's eſtate is, by this act, declared to be the ſame as if he were ſerved heir to him: ſo that he muſt be in the ſame caſe with reſpect to his father's creditors, as if the ſervice were actually expede; ſeeing it is abſurd to ſuppoſe his poſſeſſing, without making up any title to his grandfather, ſhould put him in a better ſituation than if he had purchaſed rights to the eſtate wherewith to clothe his poſſeſſion. And, if the defender's doctrine were to take place, it would follow, that, whenever the interjected perſon had contracted debts to the value of the eſtate, if his heirs refuſed to ſerve, and abſtained from poſſeſſing, the creditors would not only be defeated of their payment, but the eſtate might become caduciary, and fall to the crown; or, as abandoned and derelinquiſh'd, become a wilderneſs: but no ſuch conſequences ought to follow from this act; ſince it ſhould receive execution in the following manner, *viz.* if the next heir poſſeſſes the eſtate of a remoter predeceſſor, he ought to be decerned to the value thereof in an action at the inſtance of the creditors of the interjected perſon; or, if he abſtains from poſſeſſing altogether, when it is only affectable by the creditors of the interjected predeceſſor, a decreet declaratory ſhould paſs, upon a proof of the deceas'd debtor's being three years in poſſeſſion, whereupon adjudication may follow, ſo as the eſtate might be ſubjected to their payment: and, even ſuppoſing the ſtatute were defective, the Court ought to lay down a rule in order to its being carried into execution. Thus the Lords introduced a method, when the heir of the debtor lay out unentered, whereby an adjudication *cognitionis cauſâ*, proceeded upon a renunciation, in obedience to a charge to enter heir.

Duplied for the defender: That an heir entered is deemed, by the law of every country, as *eadem perſona* with the defunct; and, if one intromits with the defunct's effects, he is likeways conſidered as heir, and liable to his debts, under different limitations, conform to the laws of each place; but, that one ſhould be liable to the debts and deeds of another, to whom he is not ſerved heir, and of whoſe eſtate he cannot take a ſhilling, muſt be admitted to be contrary to the common rules of law. It was unknown in *Scotland* till this ſtatute; and therefore, if the maxim, *Quod contra juris regulas eſt introductum*, hold in any caſe, it muſt in the preſent, where one is ſubjected to the debts of a party to whom he is not heir ſerved, and who has left no eſtate to the party ſubjected to his debts. If the law is viewed in this light, it is plain, that the defender cannot be liable to his father's debts, upon the firſt clauſe; ſeeing the paſſive title, introduced by it, can only take place in the two inſtances therein mentioned; the legiſlature having left all other caſes to be determined by the rules of common law, which, it is believed, the Lords will not judge themſelves impowered to break in upon, further than has been done by the ſtatute: on

the contrary, the general indefinite words of this act have always been restricted, as often as opportunities occurred, so that it might derogate as little as possible from the common law: particularly, tho' the words of the statute are general, comprehending all debts and deeds of the apparent heir, whether gratuitous or onerous; yet the Court has found, that it concerns only the onerous debts and deeds of the apparent heir: therefore the pursuer argues unjustly, when she pleads, that the defender's possession of his grandfather's estate is a virtual passing by his father; seeing he could not take nor possess it as his father's, no more than if his father had died before his grandfather. But, supposing that possessing of the grandfather's estate was a passing by the father, still the law has not declared it to be a passive title, so as to subject him to the apparent heir's debts; as it has limited the passive title, thereby introduced, to the two cases above mentioned, leaving the creditors, in every other instance, upon the same footing they were before the date of the act.

And, with respect to the *second* clause, it relates to a quite different matter from what is provided for by the first; as it concerns only the creditors of a defunct, who was proprietor of an estate, and who were liable to be defrauded by the arts of his apparent heir, neglecting not only to serve heir to his predecessor, but likeways purchasing in adjudications, *&c.* in order to avoid payment of his debts, whereby his predecessor's creditors were often obliged to dispute with him concerning the validity of his titles: to remedy which, the second clause is calculate. But there is not, in the whole clause, one word of the creditors of an apparent heir; nor could it well be, as they were provided for, by the first part of the act, as far as was judged necessary by the legislature. Further, this second clause concerns only the creditors of a predecessor, whose estate might have been taken by his apparent heir's serving to him; which cannot apply to the estate of an apparent heir, which is none, in the construction of law, as it cannot be taken up by a service. 2*dly*, The diligence supposed to be acquired is such as affected his predecessor's estate; which cannot relate to the apparent heir, whose debts cannot affect the estate to which he never had made up any title. 3*dly*, This clause makes no mention of the predecessor's possessing the estate; therefore, should it be construed to extend to the creditors of an apparent heir, it would repeal the former clause; as it would secure the creditors of an apparent heir, tho' he had never possessed the estate.

As to the observation made for the pursuer, That, by the second clause, "An apparent heir's possessing his predecessor's estate is declared equal to "a service; and that, by the first, such service to his predecessor sub-"jects him to the apparent heir's debts:" It is answered, That the argument is founded on several mistakes; for the second clause neither did, nor could say, That an apparent heir's possessing or purchasing diligences against his predecessor's estate was equal to a service, without overturning our feudal rights; seeing possession alone can never establish a feudal right in lands. It indeed saith, That the apparent heir's possession or purchase shall be repute a behaviour as heir, and an universal passive title to the same extent, as if he had been actually served; but the service there is only mentioned in order to determine the extent of the passive title; and not at all with a view that the possession or purchase was to have all the other legal effects of a service; consequently it cannot answer the first

clauſe of the act, which requires an actual ſervice. Further, this ſecond clauſe makes the purchaſe or poſſeſſion an univerſal paſſive title only in favours of the creditors of the predeceſſor, whoſe eſtate might have been taken by a ſervice, but gives no benefit to the creditors of an apparent heir.

In the *next* place, as to the argument, That, "The apparent heir, "who was three years in poſſeſſion, is deſigned predeceſſor to the "party, paſſing by and ſerving heir to the perſon who died in fee of "the eſtate; and therefore, in the ſecond clauſe, he muſt be comprehen-"ded under the general deſignation of predeceſſor:" It is anſwered, That, in the firſt clauſe, the apparent heir is called predeceſſor, and is made a predeceſſor to the heir, entering under the limitations therein mentioned; and ſo far only is he made a predeceſſor to a perſon, who can take none of his eſtate: but it will not from thence follow, that, in a poſterior part of the act, which ſpeaks of a predeceſſor in general, that this is alſo to be interpret of a perſon to whom one neither has nor can ſucceed; ſeeing a *predeceſſor* is a legal word, which, when indefinitely expreſſed, can only denote one to whom the apparent heir may actually ſucceed.

Laſtly, As to the ſuggeſtion, "That, if the defender's doctrine were "to take place, the fee of an eſtate might remain for ever *in hereditate* "*jacente* of the perſon laſt infeft, by the heir's refuſing to make up titles; "whereby, as he would have no right himſelf, ſo he would exclude the "creditors of a former apparent heir; wherefore the Court ought to "find out a remedy, by allowing an adjudication to paſs upon the appa-"rent heir's debt:" It is anſwered, That, as the law neither has, nor intended to give a remedy in ſuch a caſe, the Court cannot introduce one, by obliging any perſon to enter heir to his predeceſſor, unleſs he thinks fit; which, in this caſe, might be attended with very bad conſequences. *E. g.* Suppoſe that the debts of the perſon laſt infeft were equal to the value of the eſtate, and that the debts of the apparent heir were of the ſame extent, if, in ſuch a caſe, the heir was obliged to enter, he would be liable to the apparent heir's creditors *in valorem* of the eſtate; and to his predeceſſor's creditors to the full extent of their debts, whereby it would be in their power to allow the creditors of the apparent heir to evict the value of the eſtate, and leave the heir entering ſubject to pay it a ſecond time to them out of his own eſtate: therefore it was juſt and reaſonable to allow the heir to chooſe whether he would ſubject himſelf to the apparent heir's debts or not, leaving the eſtate to be affected by his predeceſſor's creditors who had a legal intereſt therein.

The Lords found the heir not liable.

And, upon a reclaiming bill and anſwers, the Lords adhered. After which, the purſuer gave in a new petition, upon a different *medium*, craving, That her ſon might be found liable from time to time *in valorem* of his intromiſſion, chiefly founding on an argument drawn by analogy from the deciſion 3d *November* 1682. *Blyth.* 2*do*, *et ſeparatim*, ſhe inſiſted, That, as the Lords had formerly modified an *interim* aliment to her; therefore ſhe again craved, That they would modify one *ſuper jure naturæ*. The Lords modified *L.* 50 *Sterling*.

N° VII.

N° VII. *January* 15. 1736.

A cautionary Obligement cannot be conſtituted by a Bill.

OF this date, I find it marked in the day-book of interlocutors, that Lord *Kilkerran* reported the following objection to a bill, to wit, That it was addreſſed to two perſons, the one as principal, the other as cautioner; the cautioner was charged, and made the objection.

The Lords found a cautionry obligation could not be conſtitute by a writing in form of a bill; and therefore found the bill null as to the cautioner.

N. B. Both had accepted ſimply.

N° VIII. *January* 20. 1736.

Thomas Mercer contra *Anna Irvine.*

A Tutrix nominate, intitled to the Benefit of the decennial Preſcription, tho' ſhe did not regularly eſtabliſh the Office in her Perſon, or make up Inventaries conform to Law.

THE deceas'd *James Mercer*, by a deed *anno* 1690, did nominate ſeveral perſons, together with *Anna Irvine* his ſpouſe, to be tutors and curators to his children; two of whom to be a quorum, whereof *Anna Irvine* to be *ſine qua non*. After his death, the widow entered on the adminiſtration of her ſon the ſaid *Thomas Mercer*'s affairs, and continued to act for him from 1702 to 1719, when he was of age; and, from that period, he acquieſced in her management until the 1735, when he inſiſted in a proceſs of compt and reckoning againſt her.

For *Anna Irvine* it was pled: That the action was cut off by the decennial preſcription, introduced by the act 1696; which was a more favourable defence in this caſe, conſidering the purſuer was ſo well ſatisfied with her conduct: That, upon his majority, he gave his ſiſters an additional proviſion, upon a narrative, that ſhe had greatly improven his eſtate in his nonage; beſides, by delaying to bring this proceſs ſo long, moſt of the perſons are now dead who could have cleared her adminiſtration, particularly Provoſt *Alardice*, who had concurred with her therein.

Anſwered: That the defender had entered upon the management of his affairs without accepting the office, or making up inventaries, as the act 1672 directs: therefore ſhe was not intitled to the benefit of the act 1696; ſeeing it is not the nomination of a tutor, but the following the direction of the law that gives a right to exerciſe the office; of conſequence ſhe behoved to be conſidered as a protutor, who, by the act of ſederunt 10th *June* 1665, is liable during the long preſcription: ſo that the act 1696 cannot protect her, as it reſpects only tutors, *&c.* who have a legal title, and not ſuch who have acted without any lawful warrant; which doctrine

ought

ought to hold with greater force here, as ſhe never notified the deed to any of the other perſons named, altho' it was regiſtred in the 1716; when ſhe, alongſt with Provoſt *Allardice*, another of the tutors, conſented to the purſuer's diſcharging a tack. But, conſidering that ſhe had acted for fourteen years preceeding, without the knowledge or concurrence of the reſt, her acting could not be aſcribed to the nomination, which required two at leaſt to be a quorum.

2*dly*, This ſingle act cannot be deemed the deed of a tutor or curator; becauſe ſhe did not legally eſtabliſh the office in her perſon. And, with regard to the narrative of the bond of proviſion to his ſiſters, it is anſwered, that, at the time when it was granted, he imagined his mother had acted beneficially for him; but, upon inquiring more particularly into the ſtate of his affairs, he finds ſhe is greatly in his debt.

Replied for *Anna Irvine:* That, as ſhe was named one of the tutors, *&c.* her actings muſt be preſumed to have been in conſequence thereof, in order to give her the benefit of the preſcription; ſo that ſhe is not now bound to inſtruct her conduct was regular in every reſpect: and indeed, if the ſtatute were only to protect tutors where their behaviour were unexceptionable, it would be altogether uſeleſs. 2*dly*, It is by no means a clear point, what is the quorum required by the nomination: but, ſuppoſing two to be neceſſary, it did not vacate the tutory, tho' only one of them accepted; as was found 11th *February* 1676. But, 3*tio*, granting this alſo were doubtful, yet, as ſhe was not quarelled during her adminiſtration, but allowed to act until the purſuer's majority, her conduct could not now be impugned; of courſe ſhe is intitled to every privilege competent to a tutor; juſt as in the caſe of an illegal magiſtracy, who are allowed to continue unquarrelled in the exerciſe of their office until it expire; after which, as no reduction lies againſt them, ſo their adminiſtration is conſidered as if it had been legal. Beſides, ſuppoſing the preſcription was only pleadable by thoſe to whoſe right there lay no objection, yet, after it is run, the preſumption is, That they acted agreeable to the powers given them; eſpecially as after that period the law does not oblige them to preſerve the vouchers of their accounts, the preſcription being equal to a diſcharge. As to her omitting to make up inventaries, it is of no importance; becauſe the act 1672, which ordains it, adjects certain penalties to the contravention of the ſtatute, ſuch as being liable for omiſſions, loſing expences, *&c.*; but ſtill they remain tutors; their deeds are valid, and of conſequence they have right to plead the benefit of the decennial preſcription.

The purſuer *duplied:* The deſign of the act 1696 was to induce tutors, *&c.* (by relaxing the rigour of the common law) to enter upon a legal adminiſtration of the affairs of orphans, and to prevent their falling into the hands of thoſe who engire themſelves into the management of their effects, without following the directions of the law with regard to giving up inventaries; therefore the defender ought not to have the benefit of the ſtatute, as her conduct was altogether irregular: for, notwithſtanding ſhe had the cuſtody of the defunct's writings, there is no evidence ſhe ever made the nomination known to, or acted in concert with any of the perſons named, at leaſt during the tutory. So that her acting in that period cannot be preſumed to have been in virtue of the deed; as thereby two were neceſſary in order to conſtitute a quorum: for it appoints the ſaid *Anna Irvine ſine qua non*, and then adds, *And one of the foreſaid perſons being always a ſufficient quorum.* Which, as the words are copulative, made it

neceſſary, in order to conſtitute a quorum, that ſhe and one of the other perſons named ſhould concur; ſo that ſhe could not alone lawfully aſſume the management or aſcribe it to the nomination in oppoſition to the expreſs terms thereof. As to the deciſion quotted, it is ſingle, and contrary to all principles, That a power entruſted with two ſhould be carried into execution by one; beſides, it ſeems to be founded on this, that the tutors nominate had refuſed to accept; which cannot apply to the preſent queſtion, ſeeing here the defender is charged with ſecreting the nomination: nor can a ſingle act, wherein ſhe concurred with Provoſt *Allardice* during the curatory, found any preſumption, that from the beginning ſhe behaved in the ſame manner: neither is the argument drawn from the acts and deeds of an illegal magiſtracy to the purpoſe; as that is founded on reaſons of public utility, and the inconveniencies that might follow a contrary doctrine.

Laſtly, It is begging the queſtion to ſay, That the objections to her management are not competent after the preſcription is run; as the point in diſpute is, Whether or not ſhe is intitled to the benefit of the preſcription at all?

The Lords ſuſtained the defence upon the act of Parliament 1696.

N° IX. *February* 4. 1736.

Charles Earl of *Peterburrow* contra the Creditors of Sir *Peter Fraſer* of *Duris*.

Is a Wadſet, purchaſed by an Heir of Entail, the Reverſion of which made Part of the entailed Eſtate, affectable for his Debts?

SIR *Alexander Fraſer* having purchaſed the eſtate of *Duris*, comprehending the lands of *Strachan* and *Culperſheugh*, entailed it under the uſual prohibitory and irritant clauſes: after his deceaſe, it deſcended to Sir *Peter Fraſer* his eldeſt ſon, who contracted a great many debts; and, upon his demiſe, it again devolved to *Charles* Earl of *Peterburrow*, as the next heir of entail, who inſiſted for reducing the debts contracted by Sir *Peter*, as having no power to charge the eſtate with any burdens other than what is contained in the tailzie.

The defence offered for the creditors, was, That Sir *Peter* had an intereſt in the lands of *Strachan* and *Culperſheugh*, ſubject to no limitations or conditions whatever, which, from the rights produced, was inſtructed in the following manner, *viz.* it appeared, That the Earl of *Marſhall*, *anno* 1642, conveyed theſe lands, by way of proper wadſet, to Sir *Thomas Burnet* of *Leys*, redeemable upon payment of 57090 merks, wherein he was publickly infeft; and that the Earl of *Marſhall*'s creditors had appriſed his eſtate *anno* 1650, whereby they carried a right, not only to the eſtate of *Duris*, but to the reverſion of the lands which had been wadſet to Sir *Thomas Burnet*.

Further, it appeared that Sir *Alexander Fraſer*, *anno* 1666, did purchaſe the eſtate of *Duris*, comprehending the above reverſion, from the Earl of *Marſhall*'s creditors, with his concurrence, which he entailed in the 1667

and

and 1669 in manner as above ſet furth; and likeways, that Sir *Alexander* had acquired a right to ſome ſecurities on the ſaid wadſet, whereby, when Sir *Peter* came to ſucceed to the entailed eſtate, there remained only outſtanding on the wadſet the ſum of 27090 merks, which he having paid, obtained a diſpoſition thereto, *anno* 1687 from the heirs of the wadſetter. This right or intereſt in the wadſet, ſo far as extended to the ſum paid by Sir *Peter*, the creditors contended, was affectable for his debts; ſeeing, from the above ſtate of the facts, it was plain, that Sir *Alexander*, at the date of the entail, had no intereſt in the wadſet-lands other than a right to redeem: ſo that the clauſes in the entail could not affect any greater intereſt in the eſtate, than what belonged to the maker thereof. And the act 1685, the proper baſis upon which all entails do ſtand, refers particularly to lands in the right of the tailzier, at the date of the tailzie. 2*do*, The clauſes in the entail are conceived ſo as to affect what belonged to Sir *Alexander* himſelf, being chiefly limitations upon his heirs; wherefore the words can reach no further than ſuch lands and eſtate as they were to take by deſcent from him. 3*tio*, There appears nothing in this caſe to hinder the wadſet-right, acquired by Sir *Peter*, to go to his heir of line, and the tailzied eſtate to the heirs of tailzie. And, as he did not extinguiſh, but take a formal right thereto, differing in ſubſtitution from the entail itſelf, it cannot be conſtrued to give any additional force to the entail; eſpecially as the entailed ſubjects are not put in a worſe condition by the creditors having acceſs to affect this purchaſe.

For the Earl of *Peterburrow* it was anſwered: The nature of a reverſion is ſuch, that, when the redeemable right comes to be paid off, the full property is in the reverſer; and there is an end of the redeemable burden: ſo ſoon therefore as Sir *Peter* paid off the wadſet, the full eſtate was in him, from that time, in the ſame manner as if it had never been granted; and, in this caſe, particularly, as Sir *Alexander*, when he purchaſed the reverſion, became bound to pay the wadſet-money, by relieving the Earl of *Marſhall* of the requiſition, the wadſet-ſum was a debt upon him, part of which he cleared in his own time, excepting the 27090 merks paid by Sir *Peter*; and which, by a clauſe in the tailzie, whereby the heirs are obliged to pay the tailzier's debts, he might have been compelled to pay; of conſequence the payment behoved to operate in extinction of the debt, more eſpecially as he did not keep it up by taking a conveyance to a truſtee, but took it directly to himſelf, the reverſer, whereby the eſtate was as much diſburdened of the wadſet, as it would have been of any adjudication or heritable bond that he had paid. And, ſuppoſing it ſhould be conſidered as an acquiſition, yet, in that view, it as effectually accreſced to the eſtate as if he had purged off any other incumbrance whatſoever; if it were otherways, ſeveral odd conſequences would follow. Thus, for inſtance, all the incumbrances, where the heirs of line and heirs of entail are different, behoved to deſcend as ſeparate eſtates, the one to the heirs of line, and the other to the heir of tailzie. In the *next* place, altho' it is not alledged, that any of the debts were contracted to pay off the wadſet; yet, it is now pled, that they muſt affect it; becauſe Sir *Peter* diſburdened the heir of entail of ſo much debt, as the eſtate is thereby in no worſe caſe than it was at the date of the tailzie. But, at this rate, ſuppoſing Sir *Peter* had paid the debts out of the rents of the eſtate, as probably he did, and ſo paid it out of what were the effects of Sir *Alexander*; yet, nevertheleſs, it muſt remain a burden upon

upon the eſtate againſt the ſucceeding heirs of entail; the conſequence whereof would be, that no entailed eſtate, where there are any debts affecting it at the time of the entail, could ever be effectually diſburdened: for, if an heir of entail thinks fit to extinguiſh debts affecting the eſtate, if he does not make a new entail; then either he, or any ſubſequent heir, at the diſtance of whatever period, (for this matter admits of no preſcription) might charge the eſtate with as much debt as did affect it the time of the entail; becauſe, according to the creditors reaſoning, ſuch contractions do not put the eſtate in a worſe caſe than it was at the date of the tailzie: if this be law, it would make a record of debts, that affects a tailzied eſtate at the date thereof, full as uſeful and neceſſary as the record of entails.

Replied for the creditors: The clauſe in the entail, whereby Sir *Peter* was bound to pay the tailzier's debts, cannot be extended to the redeeming of wadſets, which are proper heritable eſtates in the wadſetter's poſſeſſing the lands, by virtue of redeemable diſpoſitions; which, tho' they contain a clauſe of requiſition, yet, until that is made, they cannot come under the notion of debts. As to what is urged, That a wadſet is of the nature of an heritable bond or adjudication, which, if Sir *Peter* had paid, could not thereafter remain a burden on the entailed eſtate, being extinguiſhed *confuſione*; it is anſwered, 1*mo*, That it cannot be admitted, even ſuppoſing the purchaſe had been of an heritable debt granted by the maker of the entail, that this heritable bond, conveyed to Sir *Peter* and his heirs or aſſignies, could not have been affected for his debts; ſeeing there is no law that declares ſuch acquiſition ſhould become *ipſo facto* extinguiſhed; eſpecially if a conveyance, and not a diſcharge, was taken thereto: but when it is conſidered, that the right in queſtion is a proper wadſet, and not a heritable bond or adjudication, the argument is ſtill ſtronger; as theſe are extinguiſhable by poſſeſſion, which a proper wadſet is not; nor is there the leaſt foundation for preſuming that the wadſet was paid out of the rents of the eſtate. 2*do*, It may be true, that, when a perſon who is debtor acquires a right, it will, in ſome inſtances, be extinguiſhed *confuſione*; yet, in others, the confuſion does only operate a temporary ſuſpenſion of the effect of their right. *E. g.* If two ſeparate eſtates are ſprung from the ſame ſubject, and happen both to center in one perſon, this does not itſelf *eo ipſo* ſopite the two eſtates, ſo as they may not deſcend thereafter to different heirs, or that one may and the other may not be affectable for the debts of the heir for the time being; nor does it make any difference, that Sir *Peter* did not take the conveyance in the name of a truſtee; ſeeing it would have belonged to him juſt as much in that ſhape as in the way it was taken; and conſequently equally liable to be affected.

The Lords found, That the wadſet was affectable by the creditors to the extent of 27090 *merks.*

N° X.

N° X. *February* 6. 1736.

Jean and *Elizabeth Halyburtons* contra *Graham* of *Moſsknow*.

Preſcription.

THE deceas'd *Irvine* of *Bonſhaw* granted two bonds to Captain *Blair*, in the 1683 and 1684, for *L.* 300 *Sterling*; in which he aſſigned the Captain, for his payment, to the rents of *Bonſhaw* in *Moſsknow*'s hands, to whom he had diſponed his eſtate, who, in conſideration thereof, undertook the payment of *Bonſhaw*'s debts. And, in the year 1687, *Moſsknow* granted an obligation to Captain *Blair*, whereby "He bound himſelf to "pay all debts owing by *Bonſhaw* to him, according to the inſtructions of "the ſame to be given to him by the Captain, and to apply the rents of "*Bonſhaw*'s eſtate, for crop 1686 and downwards, for payment of the "debts due by *Bonſhaw* to Captain *Blair*." Upon which obligation inhibition and horning were uſed in the 1692.

Theſe deeds having come, by progreſs, into the perſons of the ſaids *Jean* and *Elizabeth Halyburtons*, they brought an action, in the year 1730, againſt *Moſsknow*, for payment of the *L.* 300 *Sterling*, founded on his own obligation.

For the defender it was *pleaded*: 1*mo*, That he was only cautioner for *Bonſhaw*; and, as his debts were extinguiſhed by preſcription, conſequently the acceſſory fell with it. 2*do*, That the cautionry-obligation was not for any ſpecific ſum, but, in general, for all debts that ſhould be inſtructed to be due by the principal debtor. And, 3*tio*, That, by the quality of the obligation, inſtructions of the debts behoved to be given to the obligant, which could not now be complied with, as they were preſcribed.

Anſwered for the purſuers: It ſignifieth nothing, that the years of preſcription were run from the date of the bonds due by *Bonſhaw*; ſeeing the defender was expreſsly bound, by his own obligation, to pay the debts, owing by *Bonſhaw*, to Captain *Blair*, at the date thereof: therefore, as his obligation was not preſcribed, he muſt be liable for every debt due by *Bonſhaw*, at the time he entered into that obligation; it being an eſtabliſhed rule, That he who becomes bound *conſtituendo*, remains ſo, if the debt exiſted at the time of his obligation, tho', before he be ſued, it ſhould be preſcribed; as appears from the *L.* 18. *De pecunia conſt.* § 1. And it is a miſtake to conſider *Moſsknow*'s obligation as an acceſſory: that muſt fall when the principal is preſcribed; ſeeing he was really a *correus debendi*, who came in place of the original debtor: neither is there any foundation for diſtinguiſhing betwixt an obligation that relates to debts in general, or to a particular ſum; ſeeing the defender is as much bound to pay all the debts which, at the date thereof, were owing by *Bonſhaw*, as if it had related to a ſpecific ſum; becauſe the effect of the diligence done upon the defender's obligation muſt be to maintain it in the ſame force it had the day it was entered into; conſequently, as it was then a valid obligation for the whole debts, tho' not named, it muſt be ſo now, no preſcription having run from the time of the diligence; which is likeways eſtabliſhed by the *L.* 14. *De pecunia conſt.*; where it is laid down as a rule, That

qui conſtituit ſe ſoluturum tenetur, ſive adjecit certam quantitatem, ſive non: which doctrine is likeways agreeable to our practice; as it has been found, That a general acknowledgment of debt owing, without relating to any particular one, ſaved the running of preſcription with reſpect to the *modus probandi* of a debt, not probable by witneſſes after three years, 20th *February* 1700, *Gideon Elliot*; which proceeds upon this principle, That the acknowledgment of debts in general, puts a ſtop to the preſcription of every one owing at that period, and makes them conſidered as of the date of ſuch obligation; therefore bonds, tho' now preſcribed, may be uſed to prove that they exiſted at the time of the obligation. Beſides, the purſuer deſires to know, What poſſibly could be done other than charging the defender in terms of his own deed? he could not be charged for payment of particular debts, as it behoved to proceed conform to the terms of the obligation: all which arguments apply with greater force, when it is conſidered, that the defender got the original debtor's eſtate, in conſequence whereof he undertook the payment of his debts: ſo that here was a plain delegation. Beſides, the obligation was granted after *Bonſhaw*'s death; which ſhows, that the defender was not interpoſing as a cautioner, but was binding for himſelf, as having a right to the debtor's eſtate.

The defender *replied:* Suppoſing the obligation had been ſpecial, it would not have ſaved the bonds from preſcription, unleſs they had been innovate by his becoming a principal; in conſequence whereof, the original debtor would have been liberate; which was not the caſe here: but, whatever would have been the effect of its being ſpecial, as it relates only to debts in general, there is no difference betwixt the preſent queſtion and that of a common cautioner; as the two bonds were not extinguiſhed, but only an obligation granted to pay the debts that ſhould be inſtructed; which neceſſarily ſuppoſes them to be exiſting when they were demanded. To illuſtrate this, the caſe was put, That Captain *Blair* had received payment from *Bonſhaw* between the date of the obligation and the production of the inſtructions. Surely he could not have recovered it a ſecond time; as it could not thereafter have heen inſtructed to be a debt of *Bonſhaw*'s when the demand was made, altho' it was ſo at the date of the obligation: it is therefore begging the queſtion, to ſay, That, if *Moſs-know* was bound *ab initio*, he remained ſo until his own obligation preſcribed, ſeeing he was only bound to pay what *Bonſhaw* could have been obliged to; therefore, if he would have had a good exception againſt payment, ſo muſt the defender; as the obligement is not to pay any particular ſum, but only debts in general, which implies a power to object againſt the inſtructions when offered; and, if they are actually extinguiſhed when demanded, eventually he is free. Beſides, as this deed is an obligation to pay the debts due by another, How is it poſſible the defender can operate his relief (if he ſhould be found liable) upon bonds that are preſcribed, which, *preſumptione juris et de jure*, are declared to be no debts, in ſo much that they could not be founded on by way of compenſation?

As to the quotations from the civil law, they are of no force; for the doctrine of *conſtituta pecunia* has, at preſent, no place in the practice of nations: but, ſuppoſing it had, the *L.* 14. ſays only, that a definite ſum needs not be contained expreſsly in the paction, which received the name of *conſtitutum*. But ſtill, in order to make it effectual, it muſt have been certain, either by the agreement itſelf, or by relation to ſomewhat which rendered it ſo: which is not the caſe here; as the obligation founded on,

ſuppoſes

ſuppoſes an uncertainty, to be determined by inſtructions afterwards to be produced. Further, the law ſeems to relate to a perſon's entering into a *conſtitutum* for his own debt, and not for another's; in ſuch a caſe, if he who had the benefit of a temporal exception brings himſelf under a freſh obligation, he is ſuppoſed to renounce the benefit of the exception competent againſt the firſt: neither is the deciſion in point, as the acknowledgment there was made by the debtor himſelf; and, tho' the debt was not mentioned, yet it would appear to have been under the party's view at the time: but that can afford no argument in this diſpute, where a third party interveens, and grants an obligation which relates to no particular debt.

As to the *queſtion*, What could be done in order to ſave the bonds from preſcription, other than charging the defender in terms of his obligation? it is anſwered, That Captain *Blair* ſhould have produced the inſtructions of his debts, until which there could not regularly be a charge on this obligation; and, as that was not done, ſuch a general charge, which was intirely uncertain in itſelf, and was not made certain by relation to any other document, could never interrupt the preſcription running againſt that to which it had no relation.

With reſpect to the alledged ſpeciality ariſing from the defender's getting *Bonſhaw*'s eſtate, that cannot vary the argument; as there is no evidence produced that he was diſcharged: and innovation is never preſumed, nor does it make any difference, that the obligation was granted after the original debtor's death; ſeeing one may become cautioner in a bond as well after as before the principal's deceaſe.

The Lords repelled the defence of preſcription.

But, upon a reclaiming bill and anſwers, *They ſuſtained the defence.*

N° XI. *February* 6. 1736.

Competition, *Margaret Hamilton* with Mr. *William Grant* Advocate.

A Legacy of a Bond of Corroboration is derogated from, by a poſterior Legacy of another Bond, which made Part of the firſt.

THE deceas'd Mr. *George Meldrum* was creditor to *Duncan* of *Straithmartin* by a bond, dated 11th *December* 1702, for the ſum of *L.* 520 *Scots*; and, on the 24th of *June* 1704, *Straithmartin* granted an heritable bond of corroboration for this and other ſums he was then due to *Meldrum*, extending to *L.* 1250 *Scots*. *Meldrum*, in the ſettlement of his effects, diſponed to Juſtice *Meldrum*, his nephew, the ſum of *L.* 1250 *Scots*, in the following terms: "*Item*, to the ſaid Juſtice *Meldrum*, the ſum of *L.* 1250 "money foreſaid, annualrents thereof, bygone and to come, liquidate ex- "pences, and termly failzies contained in an heritable bond, granted by "*Alexander Duncan* of *Straithmartin* to me, dated 24th *June* 1704, and "in my ſaſine following thereon."

After

After which, follows three or four legacies to other perſons; and then the following one is ſubjoined: " *Item*, to *William Grant*, ſecond ſon to " Sir *Francis Grant* of *Cullen*, my nephew, *L.* 520 *Scots* principal, annual- " rents thereof, bygone and in time coming; and *L.* 150 of penalty con- " tained in another bond, granted by the ſaid *Alexander Duncan* of *Straith-* " *martin*, to me, dated 11th *December* 1702."

As the heritable bond of corroboration for the *L.* 1250, happened to be made up in part of the *L.* 520 *Scots* bond, a competition enſued betwixt *Margaret Hamilton*, as coming in the right of the deceas'd Juſtice *Meldrum* her huſband, and Mr. *Grant*.

For *Margaret Hamilton* it was *pled:* That the whole ſum of *L.* 1250, contained in the heritable bond of corroboration, was, by the teſtator, ſpecially made over to her huſband without any reſtriction; therefore the ſubſequent legacy to Mr. *Grant*, of another bond of *L.* 520, could have no effect; ſince none ſuch appears, other than that of the ſame date and ſum, which is corroborated by the heritable bond aſſigned to Juſtice *Meldrum*. Further, it was plain, from the words of the legacy to Mr. *Grant*, that the teſtator believed he had a bond due to him by *Straithmartin*, other than that which in part compoſed the *L.* 1250; as the adjecti onf the word *another*, ſhows that he ſuppoſed the one of which he was then ſpeaking to be a quite different debt from any of theſe contained in the heritable bond. So that the legacy to Mr. *Grant* carried in it the implied condition of a debt being due to the teſtator by *Straithmartin*, other than the *L.* 1250, the non-exiſtence of which muſt void the legacy, conform to *L.* 75. § 1, and 2. *De leg.:* nor does it make any difference, that *Straithmartin* was truly owing *L.* 520 *Scots*, by a moveable bond, of the date deſcribed in the ſettlement; ſeeing, in the preceeding part thereof, it was bequeathed to her huſband, as part of the *L.* 1250; from which there is no reaſon to preſume an intention to make any derogation.

On the other hand, it was argued for Mr. *Grant*, That the aſſignation in his favours was as expreſs and particular as any other in the ſettlement; a proof that it was intended to leave this bond to him, which was then in the teſtator's hands, as well as the corroborative bond: therefore he ought to be preferred to the general aſſignation of an acceſſory corroborative ſecurity, containing ſeveral other ſums in favours of Juſtice *Meldrum*; as it muſt in ſo far be underſtood to be reſtricted by the ſubſequent ſpecial legacy of one of theſe ſums to him, agreeable to the doctrine laid down in *L.* 2. *pr. ff. De trit. vin. vol. ol. legat.* and *L.* 99. § *ult. De legat.* 3.

Beſides, it is a rule, That, where the acceſſories are legate to one, and the principal ſubjects to another, the firſt muſt evaniſh in competition with the laſt; as is plain from § 17. *Inſt. De legatis.* The application whereof to the preſent queſtion muſt have the greater force, when it is conſidered, that his legacy is poſterior in order to Juſtice *Meldrum*'s; which, as it might have been annulled or reſtricted by a ſubſequent writing, ſo there appears no reaſon why the donor could not do it in the ſame deed.

As to the argument drawn from the adjection of the word *another*, it was anſwered, 1*mo*, That it muſt be ſuppoſed to refer to the bond mentioned in the immediate preceeding clauſe, which was another bond due to the teſtator, tho' by a different debtor.

2*do*, *Eſto* it referred to *Straithmartin*'s, it is no evidence the teſtator believed that this *L.* 520 *Scots* bond was not corroborated by the heritable one. And, abſtracting from the general preſumption, that every man knows

knows the ſtate of his own effects, it is plain, from the particular recital of debts and ſums in the ſettlement, that he knew the one was corroborated by the other; conſiſtent with which he might properly call it *another bond*, as they were two ſeparate deeds: and, if he knew it, the ſecond bequeathment can bear no other meaning but a reſtriction in part of the former.

The Lords preferred Mr. William Grant *to the bond of* L. 520 Scots, *principal*, &c.; *and upon the heritable bond of corroboration, in ſo far as relates thereto.*

N° XII. *February* 12. 1736.

Hale Miniſter of *Linton* contra his Creditors.

Miniſter's Stipend arreſtable.

OF this date, I find it marked in the diary, That, on report of Lord *Coupar*, the Lords found a Miniſter's ſtipend arreſtable.

N° XIII. *February* 13. 1736.

Janet and *Mary Lowis* contra *James Laurie.*

A Legacy may be gratuitouſly aſſigned, notwithſtanding a Clauſe of Return, if the Legator ſurvive the Term of Payment.

THE deceas'd *William Laurie*, tenant in *Eaſtown* of *Dumſyrie*, by his teſtament, nominated the ſaid *James Laurie* (his brother) his executor and univerſal legatar, with the burden of certain legacies; particularly, he left 2000 merks to his nephew *Robert Laurie*, payable at his majority: and, in reſpect he was then a pupil, the teſtator appointed his executor to be tutor and curator to him; after which, the following clauſe is added: "And, notwithſtanding of the legacy left by me to him, I hereby ordain "the ſame to return back to my ſaid executor and his heirs, in caſe the "ſaid *Robert* deceaſe without heirs lawfully procreat of his own body." Upon *William*'s death, *Robert* aſſigned the legacy to the ſaid *Janet* and *Mary Lowis*, and then died, after ſurviving the term of payment; whereupon they brought an action againſt the executor.

For *James*, the defence offered, was, That the legacy, by the teſtament, is provided to return to himſelf, failing *Robert* and the heirs of his body, who, having died without heirs of his body, could not gratuitouſly diſpoſe thereof to the defender's prejudice.

To which it was *anſwered:* It is a rule in ſettlements, That a ſubſtitution of heirs, where the inſtitute or prior ſubſtitutes are not tied down, by limitations, from altering the ſubſtitution to the prejudice of after ſubſtitutes, is only conſidered as a naked deſtination of ſucceſſion; and, notwithſtanding thereof, it is competent to the fiar for the time, to diſpoſe of the property to whom he pleaſes, the power of diſpoſal being the very

eſſence of property: for the law does not preſume, that a perſon, making a ſettlement, and therein calling a ſeries of ſubſtitutes, means any more than that they ſhall ſucceed, in caſe the fiar does not make uſe of his power of diſpoſal, by beſtowing it on others: See *Scot* of *Fuoſhielaw* contra *Balfour* of *Broadmeadows*.

Replied for the defender: That a clauſe of return, in favours of the granter and his heirs, has, by law, a ſtronger effect than a common ſimple ſubſtitution; ſeeing, from the preſumed intention of the teſtator, it implies the ſame thing, as if an expreſs prohibition to alter had been adjected; conſequently, it excludes all gratuitous deeds done in prejudice of the right created to the perſon, in whoſe favours the return is ſtipulate. To illuſtrate which, it was argued, That, where one grants away either lands or a ſum of money to another who is not his heir, with a clauſe of return in favours of himſelf or his heir, in caſe the granter ſhould have no heirs of his own body; it is plain, the granter thereby intends to create a right to himſelf or his heirs, upon condition that the diſponee have no children; which implies an obligation that he ſhall do no deed gratuitouſly, to diſappoint the will of the donor: therefore there is no neceſſity to add an expreſs prohibitory clauſe, in order to fix the return; for, if a prohibition is implied, the obligation not to alter is as ſtrong as if it had been expreſſed in direct and formal terms, and really imports the ſame thing as if the ſubſtitution had been made for an onerous cauſe. Neither is this the only inſtance where the law gives the ſame force to an implied prohibition, that it does to an expreſs one. Thus, for inſtance, conſtitutors of mutual tailzies can do no gratuitous deed to alter or evacuate the ſame; which is founded upon this principle, That mutual entails carry in them an implied obligation not to alter; Lord *Stair, tit. Infeft. of property*, § 59.; *January* 14. 1631, *Sharp*. In the ſame manner, ſubſtitutions, in a contract of marriage, in favours of the children of the marriage, is a bar to the father's doing any gratuitous deed in their prejudice; which ariſes not from any expreſs clauſe containing a prohibition to alter, but from the preſumed intention of parties: agreeable to which principles, it has been all along decided; as appears from the following deciſions, *January* 14. 1679, *Drummond*; *February* 10. 1685, *Mortimer*; *February* 6. 1724, *Moffat*.

To which the purſuers *duplied*: That there is no difference betwixt a ſubſtitution of the granter or his heirs and a clauſe of return: for, where the word *return* is uſed, no more but a ſubſtitution is meant; and, where that is omitted, it is not the leſs a return, having the ſame effects as if the word had been expreſſed. Neither can it be admitted, that a perſon, diſponing land to another and his heirs, with a ſubſtitution of return to his own, means to put the diſponee under any reſtriction; as, in the conſtruction of law, he is underſtood to have left him the free diſpoſal of the ſubject: for, if he had otherways intended, he could have explained his meaning by a proper clauſe. In ſome inſtances indeed the defender's doctrine may hold, where there are ſpecial circumſtances that demonſtrate this to be the intention; but, in others, where no ſpeciality occurs, as in the preſent queſtion, the grantee muſt be ſuppoſed left at liberty; otherways every ſubſtitution would end in a tailzie.

As to the inſtance of mutual tailzies, the deciſion *Sharp* contra *Sharp*, and that of obligations in contracts of marriage, they do not in the leaſt concern the point in diſpute; ſeeing the ground-work of theſe caſes is

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not ſimply onerosity, but an expreſs ſtipulation for that effect, by which the other party is bound *ex pacto*: but, where the inſtitute is put under no limitation, ſurely a prohibition to alter ought not to be implied. And, as to the deciſions quotted, they can have no influence here; ſeeing they are all grounded on ſpecial circumſtances that take them out of the general rule.

The Lords found the purſuers intitled to the legacy, in reſpect the legator ſurvived the term of payment of the legacy.

Nº XIV. *February* 13. 1736.

Competition, *James Corrie* Provoſt of *Dumfries* with *Robert Muirhead.*

1. *An Attempt to poind, ſtopped by the Poſſeſſor of the Goods, held as compleated in a Competition with a prior Arreſter.* 2. *Is the Word* apprize *in a Horning ſuperfluous, where it bears to poind and diſtrain?*

James Muirhead merchant in *Dumfries* having failed in his circumſtances, Provoſt *Corrie*, who was creditor to him, arreſted, in the hands of *Alexander Gordon*, who had the poſſeſſion of ſome ſhop-goods belonging to *James*; and thereupon raiſed a forthcoming before the Magiſtrates of that town. During the dependance, *Robert Muirhead*, who was likeways creditor to *James*, charged him with horning; and, when the days were expired, he ſent a meſſenger to *Gordon*'s houſe to poind the goods belonging to his debtor: but *Gordon* ſtopt him, upon this pretence, that the goods were already arreſted in his hands by Provoſt *Corrie*. Whereupon a competition having enſued, it was contended for *Robert Muirhead*, That he ſhould be preferred to the Provoſt in the ſame way as if his poinding had been compleated; ſeeing it would be unjuſt, if, after he had gone on as far as he could, until he was ſtopt, another ſhould be allowed to ſtep in and compleat his diligence tho' poſterior to his own. To illuſtrate which, a caſe was referred to, where an adjudger was, by the delays and artifice of a debtor, ſtopt from compleating his diligence until another had finiſhed his firſt; notwithſtanding whereof, the adjudger was found not to be poſtponed, or the other creditor to have any preference to him: the reaſon of which applies directly to the point in hand; as it was, by an unlawful act of *Gordon*'s, the poinding was ſtopped, and who, by his poſſeſſion of the goods, was debtor or liable for them to the creditors, according to their diligence.

On the other hand, it was argued for Provoſt *Corrie*, That he behoved to be preferred upon his arreſtment: becauſe, 1*mo*, no poinding could have proceeded legally upon the diligence done by his competitor; as the horning at *Muirhead*'s inſtance wanted what was very material, namely, the word *apprize*, which is neceſſary when any thing is to be poinded; as it muſt firſt be valued, a ſtep that is previous to and different from the poinding itſelf; for which reaſon it is conſtantly inſerted in all hornings. Neither do the words to *poind* and *diſtrain* imply a power to do every thing neceſſary in order to the poinding; ſeeing very often making open doors

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is neceſſary, and yet it requires a particular warrant for that purpoſe. 2*do*, The execution on the back of the horning is vitiated; and ſo null. It is true, a fair one has been put into the proceſs ſince the competition commenced: but that cannot remove the objection; as the proteſt upon which *Muirhead* reſts his preference eſpecially relates to the execution on the back of the horning, after which he was not at liberty to give in a new one.

In the *next* place, ſuppoſing theſe objections were removed, an offer to poind does not transfer the property: if a meſſenger is deforced, there lies an action againſt the deforcer; but, as crimes can only touch thoſe who are guilty of them, a third party doing diligence cannot thereby be prejudged. And as to the caſe of the adjudger, no deciſion is referred to, from which the circumſtances can be known; poſſibly it might have ariſen from perſonal objections againſt the creditor's compleating his diligence in colluſion with the common debtor. But, whatever was in that, if an offer to poind could be conſidered as compleated in any caſe, it would only hold where all is done that could be to make it effectual. Now, here the meſſenger omitted to provide himſelf with letters of open doors, whereby he might have opened the preſſes in which the goods were ſtanding; and no hindrance or ſtop was put to the poinding other than this, that *Gordon* refuſed to open theſe preſſes.

Anſwered for *Muirhead*: The objections to the formality of his diligence can have no influence: for, 1*mo*, with regard to the vitiation, that is removed, by producing an original execution, wrote out fair the ſame day with the other, which the meſſenger abides by. 2*do*, There is nothing in the obſervation, That the horning wants the word *apprize*; as it bears to *poind* and *diſtrain*: nay, the word *to poind*, was ſufficient warrant for doing every thing that made part of the poinding; and, where that is, the word *apprize* is ſuperfluous: therefore, as his diligence is unexceptionable, his attempt to poind muſt be held as compleated. Nor is it of any importance, that an endeavour to poind does not tranſmit the property; as that is ſuppliable by a decree of the Court, giving a preference in reſpect of the diligence inchoate and unlawfully interrupted. Neither had the meſſenger any occaſion for letters of open doors; as he got voluntarily within the houſe, nay within the very room where the goods were lodged; and, altho' the law knows what letters of open doors are, yet letters to open cheſts and preſſes is a novelty. Beſides, he is not bound to tell whether he had ſuch letters or not; as the meſſenger was ſtopt, not for want of them, but on account of Provoſt *Corrie*'s prior arreſtment.

The Lords preferred Robert Muirhead.

N° XV. *February* 17. 1736.

John Leggat contra *Ann* and *Rachel Denoons*.

Decreet *a non ſuo judice*.

IN the queſtion betwixt theſe parties, the Lords found a decreet of forthcoming, obtained before the Bailies of *Edinburgh*, ſitting in *Edinburgh*,

burgh, againſt one of the inhabitants of the *Canongate*, not ſubject to their juriſdiction, null; and repelled the anſwer, That, by conſtant and immemorial uſage, the inhabitants of the *Canongate* were conveened before the Bailies of *Edinburgh*.

N° XVI. *Eodem die.*

Annuitants of the *York* Building Company contra *Garden* of *Troup*.

Does Payment, made by a Tenant to his Maſter, conform to Orders, before the conventional Terms in the Tack, liberate him in a Queſtion with Creditors, who, after ſuch Payment, interpelled the Tenant before the ſaid Terms?

IN the year 1728, *Troup* obtained a leaſe of ſome lands from the ſaid company, whereby he was intitled to crop 1728; and for which the tack-duty was made payable at *Lambas* and *Chriſtmaſs* 1729; and ſo on, at the ſame terms for the enſuing years.

About this time, they likeways gave ſeveral heritable rights on their lands in *Scotland* to certain annuitants, in ſecurity of debts owing to them by the company, whereupon they were infeft; and, as the company were then carrying on conſiderable undertakings in this country, they ſent Colonel *Horſey* their Governor hither, with powers to manage their affairs as fully, in all reſpects, as they could have done, if they had been here. Whereupon he applied to *Troup* to furniſh their works with ſome neceſſaries, and to be as ſpeedy in the advances of his rent as he could, without adhering ſtrictly to the conventional terms of payment; as appears from a letter he ſent to him in *September* 1730, wherein the Colonel promiſed, "That ſuch advances ſhall be allowed as money paid, upon account of "the tack-duties;" and then adds, "if it ſhall appear that you are in "advance, before the rent is due, you ſhall have lawful intereſt allow-"ed you."

In conſequence whereof, *Troup* was in uſe to make advances before the conventional terms in the tack, until about the end of the year 1732, when it would ſeem the company's affairs had gone into diſorder; for, on the 9th of *November* that year, Sir *John Merreſs*, one of the annuitants, intimated his right to *Troup*; and, in the *January* thereafter, a multiplepoinding was raiſed in his name (tho' without his knowledge), in which a proceſs of maills and duties at the inſtance of the annuitants was repeated, wherein an interlocutor was pronounced that ſeſſion.

After this, they brought another action againſt *Troup*; in which they inſiſted particularly for the rent of crop 1732.

Againſt which it was *pled* for the defender: That, in conſequence of the above letter, he had *bona fide* made advances for the company to the amount of that year's rent before he was interpelled; which, it is believed, he was in ſafety to do; as the legal terms of payment, *ſcil. Whitſunday* and *Martinmaſs* 1732, were paſt before the above proceſs of maills and duties was raiſed: and altho', by the tack, the conventional terms were later, yet, as he was impowered by Colonel *Horſey* to make advances earlier, the conventional terms muſt be underſtood to be brought forward;

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which, as the company might undoubtedly have done at firſt, ſo it was equally in their power, or any having authority from them, thereafter to alter to the legal terms.

Anſwered for the Purſuers: Their real rights in the lands gave them a title to the rents, eſpecially to ſuch as fell due after they had interpelled the defender: ſo that, granting he had paid that year's rent, it could have afforded no defence in the preſent queſtion. At the ſame time, what he pleads as payment, cannot ſo properly be called payment of rent, as a compliance with orders, by a correſpondent or factor; nothing being paid directly to the company, or any having their order to levy rents. However, ſuppoſing it were to be conſidered as ſuch, yet, being made prior to the terms agreed on by the tack, it cannot liberate the defender; ſeeing thoſe who pay before the term of payment do it at their own hazard; and therefore ought to provide for their relief. If the law ſtood otherways, it would be impoſſible to prevent heritors from evacuating the rights of creditors: and, if payment before the terms agreed on in the leaſe cannot liberate a tenant, the defender is not intitled to plead compenſation or retention on account of money laid out by him; ſeeing that would put him in a better ſituation as a creditor, than if he had fulfilled the obligation contained in the tack.

As to the pretence, the advances were made *bona fide* before interpellation, that is, fully removed by the intimation to him before *Martinmaſs* 1732, of Sir *John Merreſs*'s right, which contains an aſſignation to maills and duties: but the legal terms ought not to be conſidered as the rule whereby to determine this point; ſeeing it has been often decided, that interpellation before the conventional terms is ſufficient; which is founded on this reaſon, that, before ſuch period, the tenant cannot be compelled to pay: nay, ſo little are the legal terms regarded, that payment by a tenant, at the terms agreed on, has been found to liberate him, tho' before the legal ones; therefore, as he was interpelled by the above proceſs of maills and duties, long before the conventional terms, he muſt ſtill be liable to the purſuers; as it would be of dangerous conſequence to allow proprietors, after their granting infeftments of annualrent, to evacuate the ſame, by taking money before hand.

Replied for the defender: That the purſuer's infeftments being only in ſecurity, gives no right to the rents, until they are claimed in a proper proceſs, before which he behoved to pay his rent to his maſters. Nor can it make any variation in the preſent argument, whether the legal or conventional terms are to regulate this queſtion; ſeeing, if it is the legal ones (which is the rule betwixt heirs and executors, fiars, and liferents) there was no proper interpellation made before theſe elapſed: if, on the other hand, the terms in the tack are to ſettle it, theſe were altered by the poſterior agreement with Colonel *Horſey*, at a time when there was no view to prevent the diligence of creditors.

And, with regard to the circumſtance, That one of the annuitants intimated his right before the laſt legal term, that cannot avail him; as the defender could not refuſe to pay his rent to his maſters, upon pretence of ſuch intimation; nothing but a judicial interpellation, by proceſs, where the purſuer's titles are produced, being ſufficient for that purpoſe; as *Stair* expreſsly lays down, *lib.* 1. *tit.* 18. §. 3.

The Lords found, That the defender might pay according to the inſtructions in Colonel Horſey's *letter, after the legal term, and before the conventional, before interpellation by proceſs.*

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N° XVII. *Eodem die.*

Patrick Rankin contra *John* and *Patrick Rankins.*

1. *Import of a Clauſe in a Marriage-contract to the Heirs or Bairns of a Marriage.* 2. *Can an Heir diſcharge his Right of Succeſſion, before it opens?*

Patrick Rankin, in his contract of marriage with *Magaret Marſhall*, *anno* 1703, "Provided 1000 merks, and whatever ſhould be conqueſt during the ſtanding of the marriage, to the heirs or bairns lawfully to be procreate betwixt them; and, in caſe of predeceaſing his wife, he thereby aſſigns to her the liferent of the equal half of the free moveables."

Of this marriage there were eight children; the eldeſt of whom, *Walter*, with conſent of his father, entered into a contract of marriage with *Margaret Auld anno* 1731, wherein he becomes bound "to provide to himſelf and ſpouſe in conjunct fee and liferent; which failing, to his heirs and aſſignies whatever, means and eſtate, both heritable and moveable, that he preſently hath, his father ſhall make over to him, or what he ſhall happen to get with his wife."

From this contract it did not appear what proviſion *Patrick* had given to his ſon: but it was inſtructed by a writing holograph of *Walter*, dated in *September* 1732, that his father, at the time of the contract, had bound himſelf to pay him 1000 merks, at *Whitſunday* 1732. And further, that he had aſſigned to him a bond for 600 merks, which he had taken to himſelf in liferent, and *Walter* in fee: for which cauſes, he "diſcharges his father of the ſaid bond and aſſignation, granted at the date of the contract, and of all portion natural, bairns part of gear, and of all that his ſpouſe or he could claim, might fall or ſucceed to, either heritable or moveable, through the deceaſe of his ſaid father or mother."

After this diſcharge, *Walter* died, leaving *Patrick* his only ſon behind him: whereupon *Patrick*, the grandfather, a little before his death, made a ſettlement of his effects in favours of his own wife and children; in which, amongſt ſeveral other things, he diſponed to them two heritable bonds, on which infeftments had followed.

Of this deed *Patrick*, the grandchild, as heir to his grandfather, brought a reduction upon the head of deathbed, for ſetting aſide the conveyance, in ſo far as concerned the two heritable bonds.

To which it was *anſwered:* 1*mo*, That the ſettlement is not liable to reduction upon that head; becauſe it was made in conſequence of the prior obligement in the contract 1703, wherein *Patrick* had provided whatever he then had or ſhould thereafter *conqueſs to the heirs or bairns of that marriage*, with the burden of certain proviſions to his wife. By which the defenders had a juſt claim to all the defunct's ſucceſſion, heritable or moveable, as he had done nothing but what by law he was bound to do. 2*do*, The purſuer's claim is excluded by his father *Walter*'s receiving near double

double as much from *Patrick*, the grandfather, as any of the reſt of his children, as is inſtructed by the holograph diſcharge above mentioned.

Replied for the purſuer: That the proviſion in the contract being to the heirs or bairns, whatever ſubjects were heritable behoved to fall to the eldeſt ſon of the marriage, as heir, and did not divide amongſt all the children equally; but, whatever is the legal conſtruction of ſuch a clauſe, it has never hitherto been queſtioned, but that a father, notwithſtanding thereof, had a power of diviſion, providing this was ſettled in a reaſonable manner, ſo as not to cut out one or more of the children; which was done in the preſent caſe, by *Patrick*'s taking theſe two bonds to himſelf and his heirs, while he had ſufficient effects to provide his other children; tho' perhaps each of them would not have an equal ſhare with his heir.

In the *next* place, with reſpect to the diſcharge ſaid to be granted by the purſuer's father, as it is holograph, ſo it does not prove its date; and of conſequence muſt be preſumed to have been granted on deathbed. But, ſuppoſing it was never ſo formal as to legitime or bairn parts, yet it could not operate to defeat his right of ſucceſſion in the heritable bonds: for, as to theſe, *Walter* had no right till after his father's deceaſe; and, as he died before him, the ſucceſſion, of courſe, opens to the purſuer.

Duplied for the defenders: That, in proviſions of conqueſt in contracts of marriage to the heirs or bairns of the marriage, it is an eſtabliſhed rule, That all the children, male and female, ſucceed equally in heritable ſubjects, lands only excepted. As to which, the eldeſt ſon has the right, at leaſt ſuch is the opinion of Sir *James Stewart*, *p.* 148; and *Stair*, *p.* 482. But, with reſpect to heritable bonds, upon which infeftment followed, and burgage tenements, the Lords have determined that theſe were to be divided equally amongſt the children, in virtue of ſuch proviſions; as was found 14th *January* 1663, *Tho. Beg*; *July* 10. 1677, *Carnagy*.

Neither can it make any difference, that old *Patrick* took the bonds to him and his heirs; ſeeing, as they were conqueſt, they belonged to the defenders, as falling under the above clauſe. And, with regard to the obſervation, That the diſcharge being holograph, does not prove its date; it is anſwered, The purſuer repreſents his father in a conſiderable moveable eſtate; therefore he cannot object thereto: and, altho' he could, the defenders offer to prove that the diſcharge was ſeen in old *Patrick*'s hands a conſiderable time before the granter died. Nor can it vary the queſtion, that *Walter* died before his father; ſince it has been determined, that ſuch proviſions may be diſcharged in the father's lifetime. See the caſe of *Elizabeth Moodie* contra *Stewart* of *Burgh*.

The Lords found, That, by the proviſion in old Patrick's *contract of marriage, in favours of heirs and bairns, all the children come in* per capita. 2do, *That the deeds executed, of the date of* Walter's *contract of marriage, are to be underſtood as a part thereof, and as if they had been contained therein.* 3tio, *That* Walter *could not grant on deathbed the diſcharge founded on by the defenders. And,* 4to, *found, That the* 1600 *merks, made over by old* Patrick *to* Walter, *of the date of his contract of marriage, muſt impute in any claim he might have in virtue of his father's contract of marriage with* Margaret Marſhall *his mother.*

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N° XVIII.

Collation amongſt Heirs of Proviſion.

AGAINST the fourth or laſt branch of the above interlocutor, the purſuer reclaimed upon this ground, That it tended not only to introduce a neceſſary collation amongſt heirs of proviſion, which was a novelty in our law, but likeways to deprive the father of the power of diſpoſal of any part of his means in his own time, and to reſtrain him from dividing amongſt his children the ſubject of his conqueſt, by ſuch proportions as he ſhall think fit, contrary to the deſign of ſuch clauſes; which means no more than to tie up his hands from doing any fraudulent deed to diſappoint the children of that marriage, by providing the ſame ſubject to thoſe of a ſubſequent one, or ſubſtituting others to ſucceed to him by voluntary conveyances. That hitherto no practick had occurred tending to reſtrain the father's power of diſtributing the conqueſt amongſt the children of the ſame marriage, to take effect at his death; far leſs from giving away any part of it, while he is in *liege pouſtie*; eſpecially if a competency is left to his heirs of proviſion.

And that collation does not take place amongſt heirs of proviſion, is a point ſettled by the deciſion 19th *November* 1720, *Rickart*.

It is true, that this rule does not hold with reſpect to legitime or bairns-part, which is a portion of the father's moveables that ariſes to the children *ex lege*, in which they have an equal intereſt, even during the marriage; but that is widely different from a proviſion of conqueſt to the heirs or bairns of a marriage.

It has been found indeed, That proviſions by a father in a child's contract of marriage, is preſumed to be in ſatisfaction of a ſpecial proviſion in a bond granted by the father, upon this principle, That *debitor non præſumitur donare*, 29th *June* 1680, *Young*: But that cannot apply to a proviſion of conqueſt; as the father hath a diſcretionary power over that ſubject, by providing a larger or ſmaller proportion of it, to any of his children he thinks fit.

The defenders *anſwered*: That the point determined is founded upon the maxim, *Debitor non præſumitur donare*; which, tho' it may ſometimes fail in circumſtantiate caſes, yet there is nothing here from which it can be preſumed the father intended a gift in favours of his ſon: it was given as a proviſion in a contract of marriage, which is not of the nature of a pure donation; ſeeing ſuch proviſions are conſtructed to be in implement of the ſettlement that was made in favours of the children, *Stair*, *p.* 168.

As to a father's power of making an unequal diviſion of the ſubjects conqueſt, it is believed he may; and, in fact, it was ſo done here: for the purſuer's father got more from *Patrick* than the reſt of the children will get; but that is nothing to the preſent queſtion, which is, How far the father intended to give this proviſion towards ſatisfaction of his eldeſt ſon's intereſt in the proviſions in the firſt contract? The preſumption ſurely is, That he did not intend to gift it, but that it ſhould be imputed juſt as much as if it had been expreſsly in the writ; ſeeing, as the father was the adminiſtrator of the common ſubjects, it is to be preſumed that every

thing he did was in conformity to the firſt contract; therefore his giving off a proportion to the eldeſt ſon, more than he would have drawn by courſe of ſucceſſion, muſt be ſuppoſed to have been given in ſatisfaction of his ſhare, and the ſuperplus as a *præcipuum*.

The deciſion *Rickart* contra *Rickart* does not apply; as the preſumption of the father's will to keep an equality in ſuch a matter as this is more eaſily to be preſumed, than with reſpect to land.

As to the obſervation drawn from the deciſion in *Young*'s caſe, That the father there was liable to pay a ſum by ſpecial obligement, whereas here he was under no ſuch tie, but might have diſpoſed of the conqueſt in what manner he thought fit; it is anſwered, The diſtinction makes no difference: for, tho' old *Patrick* had a power to have given unequal proviſions amongſt his children, yet, as by the contract, they were equally called, the preſumption muſt be, that in all his adminiſtration he had that equality in view, as well as to anſwer his own obligement.

The Lords adhered.

N° XIX. *February* 17. 1736.

Lady *Orbiſton* contra *Charles Hamilton*.

No Salaries due to a Factor without Paction.

IN the proceſs of compt and reckoning betwixt theſe parties, Mr. *Hamilton* craved allowance of *L.* 330 *Scots*, for acting three years as Lady *Orbiſton*'s factor, by uplifting the jointure payable to her out of the eſtate of *Orbiſton*.

It was acknowledged there was no expreſs bargain betwixt the Lady and him, when he obtained the factory, anent what reward he was to have for his trouble; however, he contended that ſome ſuitable gratification was due to him for his pains, eſpecially conſidering ſhe had been in uſe to allow former factors, particularly *George Aitkman*, the ſame ſalary that was then demanded; and, when the defender undertook that buſineſs, it was underſtood he was to be upon the ſame footing with him.

It was acknowledged, That, in general, the nature of a mandate is gratuitous; notwithſtanding of which, the law ſays, *Sin renumerandi gratia, honor intervenerit, erit mandati actio:* therefore there was no neceſſity to make a new bargain, as he came in place of others to whom a ſalary was given; and of conſequence was intitled to the like reward: and that, in executing all commiſſions whatever, a ſalary or gratification is implied, *e. g.* merchants have their commiſſions, the Lords factors have five *per cent* of all their intromiſſions, without any previous paction: and lawyers agree, That *negotiorum geſtores* are not only intitled to their expences, but to a remuneration; therefore it would be hard to deny him as a factor, what he would have been intitled to as a *negotiorum geſtor*.

Anſwered for Lady *Orbiſton:* That, in the year 1723, the defender propoſed to her to take a leaſe of the parks of *Orbiſton* which ſhe liferented, during which he offered to uplift her jointure from the tenants, without any mention of fee or reward; in conſequence whereof, ſhe ſet the parks

parks to him, giving him at the ſame time a power to raiſe her jointure, which amounted to about *L.* 100 *Sterling* yearly; and while he acted as factor, ſhe allowed him the uſe of all her kain, fowl, dargs and carriages, worth about *L.* 5 *Sterling* yearly: ſo that he had nigh five *per cent* of the ſubject of his intromiſſion (without including the uſe of *Orbiſton* houſe) for his trouble, which ſhe thought a ſufficient recompence without a ſalary. And, as no agreement had been made for one, ſhe pled, That the defender had no title to any, as was found in the proceſs betwixt Duke of *Montroſe* and *Graham* of *Kilmannan*. Neither does the text quoted from the civil law concern the preſent queſtion; as the caſe there put is of an honorary which is given or promiſed, for which, ſays *Ulpian*, *Erit actio mandati*, even though it might be thought inconſiſtent with the nature of a gratuitous contract. The caſe of merchants who have commiſſion-money without paction, does not apply; as they live by their buſineſs: nor is there any ſimilitude betwixt factors appointed by judges, and thoſe named by private perſons; more eſpecially, as Lord *Stair* obſerves, that the Lords of Seſſion were in uſe either to name the ſalaries in their factories, or expreſsly to reſerve it till compt and reckoning: ſo that, after it was univerſally underſtood that a ſalary was annexed to ſuch office, there was no neceſſity of mentioning it in the commiſſion.

Neither can the ſpeciality, on which the defender lays ſo great a ſtreſs, avail him, namely, that one of the former factors got a ſalary; ſeeing that was in conſequence of an expreſs paction. And it might as well be argued, that an allowance for board was due by a major, tho' without paction; becauſe perhaps he had paid board to the houſe where he was maintained immediately before. But, when the fact is ſet forth, the argument turns ſtrongly the other way; ſeeing there were two factors interjected betwixt *George Aitkman* and the defender, neither of whom had any ſalary.

The Lords refuſed to allow this article, in regard it did not appear that there was a paction for any ſalary or reward offered to be proven.

N° XX. *February* 18. 1736.

Dickſon of *Kilbucco*, and *Dickſon* of *Whitſlide*, contra *Margaret Tweedie*, *John* and *James Jameſons* Tenants in *Whitſlide*.

Is an Intimation or Charge previous to the Iſſue of a Tack neceſſary, notwithſtanding the Tenant has obliged himſelf to remove, without any Warning, Intimation or Charge?

Whitſlide having diſponed his eſtate to *Kilbucco* in truſt, he, with *Whitſlide*'s conſent, ſet for the ſpace of nine years a leaſe of the houſes and lands of *Whitſlide* to the ſaid tenants; in which they oblige themſelves *to remove at the expiry of the tack* (*Whitſunday* 1735) *without any warning or legal intimation made to them, or proceſs of law againſt them.* Towards the end of this leaſe, (*Kilbucco* being denuded of his truſt) *Whitſlide* ſigned a precept of warning, which was ſaid to be execute in common form, againſt *Margaret Tweedie*, &c.; as alſo he raiſed a horning upon

upon the tack both in his own and *Kilbucco*'s name; in virtue whereof theſe tenants were charged, on the 15th day of *May* 1735, to remove from the ſaid lands, *&c.* at *Whitſunday* next to come.

The tenants ſuſpended, and *pled:* That they had never received any warning, without which, or an intimation, or charge previous to the term, they were not bound to remove, notwithſtanding of the ſtipulation in the tack: for, tho' the caſe of tenants bound to remove at the iſſue of their tack without warning, may not fall under the ſtatute 1555; yet ſome antecedent warning or charge is ſurely neceſſary; otherways the deſign of that excellent law might be fruſtrated, which was made to provide againſt tenants being put unawares to ſeek their habitations at unſeaſonable times, agreeable to Lord *Stair*'s ſentiment, *p.* 321. and 624. Neither can the charge on the fifteen day of *May* be conſidered as an intimation antecedent to the term: on the contrary, as the term was come before they were charged, they behoved to have the benefit of tacit relocation; more eſpecially as the charge was not given to remove at *Whitſunday* 1735, but *at Whitſunday next to come*, which the ſuſpender underſtood to mean *Whitſunday* 1736; and indeed a charge, given upon the 15th day of *May* to remove that day, would have been inept; becauſe the tack, which was the ground thereof, conſented only to a charge upon ſix days notice.

Replied for the chargers: That, where a tack is ſet for a certain number of years, the tenant cannot be removed, without a warning in terms of the ſtatute; ſeeing the omiſſion thereof imports, in the conſtruction of law, a new agreement for another year's tack; but, where the tenant is expreſsly bound to remove, without warning or intimation, it is impoſſible that the neglecting to uſe ſuch can imply a renewal of the leaſe; as the obligation ſuperſedes the neceſſity thereof, agreeable to what *Craig* delivers, *lib.* 2. *tit.* 9. § 6. And in *Frieſland*, where they have the like ſtatute with ours, *Sande*, *lib.* 3. *tit.* 6. *defin.* 1. lays down the ſame doctrine; ſo that, unleſs there was ſome law annulling ſuch a paction, or that it were *contra bonos mores*, it ought to take effect.

In the *uext* place, granting that ſome intimation, *&c.* were neceſſary, it has been complied with in the preſent caſe; for a warning was delivered to them, as they formerly acknowledged. It is true that ſeveral objections were made thereto, which were altogether unneceſſary; as the chargers did not inſiſt upon it as a legal warning, in regard they were not bound to execute a formal one, the ſtipulation in the tack having ſuperſeded the neceſſity thereof; but ſtill it ought to ſerve as a ſufficient notification to them, that the chargers did not paſs from the obligation in the tack whereby they were obliged to remove without warning.

And, as to the pretence, That the charge commands them to remove at *Whitſunday* next, which, it is alledged, was underſtood to mean *Whitſunday* 1736, it is by no means ſolid; ſeeing, by the tack, they are bound to remove at *Whitſunday* 1735, the will of the letters is to remove in terms thereof, and the charge refers to the letters; therefore *Whitſunday* next muſt be *Whitſunday* 1735.

The Lords found the letters orderly proceeded, ſuperſeding execution till Whitſunday *next, and without violent profits.*

N° XXI.

N° XXI. *Eodem Die.*

Elizabeth Reid contra *John Henry* of *Auchinloich* and his Son.

The Objection to an Adjudication againſt three Heirs-portioners, That one of them was not ſpecially charged, reſtricts it to a Security for the Principal and Annualrents, tho' the Shares of the other two were ſufficient to pay the Debt.

THE ſaid *Henry*'s having led an adjudication againſt the three daughters of the deceas'd *Andrew Reid* as heirs-portioners to him during the currency of the legal, *Elizabeth*, the youngeſt, brought a reduction, after both her ſiſters died, of the adjudication, upon this ground, That the ſpecial charge was only execute againſt her and her eldeſt ſiſter.

Anſwered: That, as it was regularly led againſt two of them, whoſe proportions of the eſtate were more than ſufficient to anſwer the defender's debt, it ought to be ſuſtained as to the accumulations: for, if the decreet had been taken againſt two of them, without calling the third at all, it would have been a valid ſecurity for the debt; and therefore the not citing one of them ought not to free the others of what they were liable for.

Replied: The adjudication againſt the ſiſter who was not charged is informal; ſeeing it was adjudging from a perſon who had no right: which objection muſt affect the whole adjudication, even as to thoſe who are charged; becauſe, the decreet of conſtitution being againſt all of them, the adjudication has gone out againſt the ſhares of the land belonging to them that were ſpecially charged for payment of the whole debt; whereas it ought only to have been for their proportion, after deducing the ſhare of the heir not charged: in ſhort, a decreet againſt two could only proceed for two thirds of the debt; whereas this adjudication being for a third more, is irregular.

The Lords ſuſtained the reaſon of reduction of the decreet of adjudication, that the ſame is deduced againſt three heirs-portioners, and only two of them charged to enter to their predeceſſor, relevant to reſtrict the adjudication to a ſecurity for the principal ſum and annualrents.

N° XXII. *February* 19. 1736.

Archibald Scot of *Roſſie* contra *Margaret Strachan* of *Balgavies* and her Curators.

An Agreement to give a fit Man a Gratuity for undertaking the Office of Tutor; becauſe the neareſt Friends declined meddling, does not bind the Pupil.

THE ſaid *Margaret Strachan*'s father died when ſhe was an infant, leaving his affairs involved in ſeveral law-ſuits; and her neareſt relations judging that it would require a great deal of ſkill and application to

manage them, pitched upon Sir *Alexander Wedderburn* of *Blackneſs* as a proper perſon to be her tutor-dative; who accordingly undertook the office, upon obtaining an obligement from *Patrick Scot* of *Roſſie* grandfather, by the mother, to the ſaid *Margaret Strachan*, and *Alexander Strachan* her father's brother; in which *Roſſie* obliged himſelf, that, if ſhe ſurvived the age of twelve years, ſhe and her curators ſhould pay or allow to him, at compting, the ſum of *L.* 100 *Sterling*. But, in caſe ſhe died before attaining to that age, then *Alexander Strachan* obliged himſelf that her heirs ſhould pay it.

Sir *Alexander* continued to act for the young Lady, until ſhe was paſt pupillarity, when ſhe choſe curators, who having called him to accompt, he ſtated as an article of diſcharge an *L.* 100 for pains, conform to the above agreement.

The curators were very ſenſible he had a great deal of trouble in the adminiſtration of his pupil's affairs, wherein he had not only acquitted himſelf honeſtly, but likeways his ſkill and good management had proved very beneficial to her: however, as they did not think they were impowered to give him any gratification, they allowed him to retain the money, and took a bond whereby he became bound to repay it to them in the event he did not recover it from *Roſſie*'s heir. Upon which Sir *Alexander* brought an action againſt *Archibald Scot* of *Roſſie*, as repreſenting his father, founded upon the above obligement; who, in order to indemnify himſelf, brought a proceſs againſt the ſaid *Margaret Strachan* and her curators, concluding that they ought to be decerned to fulfil the contract entered into by his father for her benefit and advantage.

It was *pled* for *Margaret Strachan:* That the office of tutor is gratuitous; therefore the allowing a ſalary to Sir *Alexander* would be giving him a donation, which the law does not impower curators to make; more eſpecially as it preſumes the office was undertaken from a principle of humanity and affection, rather than any hope of reward: and, it is believed, no inſtance can be given where a tutor ever obtained a ſalary for his pains, excepting where it hath been appointed by the teſtator. Neither can this be thought a hardſhip upon tutors, altho' the infant has affairs to manage that require extraordinary trouble, as they may name factors and appoint them reaſonable ſalaries; but the conſtituting a tutor with a ſalary is a thing that has been hitherto unknown, and does not appear now ſo neceſſary, ſince the act of ſederunt, regulating the conduct of factors named by the Lords for managing pupil's eſtates.

Replied for *Roſſie:* That, as this concert among the relations to give a gratification to Sir *Alexander* was entered into ſolely for the defender's behoof, it would be very hard, if the payment thereof ſhould be thrown upon him; as his father could not poſſibly have any other thing in view, at that time, but her advantage. It was acknowledged, that tutory is a gratuitous office, and commonly undertaken either from relation or motives of friendſhip; in which caſes, no demand can be made upon account of pains and labour: but the preſent caſe was very different; where the neareſt relations, foreſeeing that the infant's affairs would require greater ſkill and addreſs than uſual, and, in conſideration thereof, thoſe who might claim that office in law forbear to meddle; but, from affection to the infant, pitch upon another, and agree to give him a moderate allowance at the end of the tutory: ſuch an agreement, as it was *in rem verſam* of the infant, ought to be ſuſtained. Nor does there ſeem any thing contrary

trary to this in law; ſeeing a ſalary or *ſolatium* was given to tutors in ſome inſtances; as appears from *L.* 33. § *ult. ff. De adminiſt. tut.*; and in other countries this is commonly practiſed. See *Paponius, lib.* 15. *tit.* 5. *art.* 12. *Gartius de expenſis, cap.* 20. *num.* 14.; and *Jac. Gothofrede*, in his treatiſe *De ſellario, cap.* 5. § 16. Beſides, the purſuer's father, when he entered into that contract, may properly be conſidered as acting the part of a *negotiorum geſtor* for the young Lady. Upon which ground the purſuer is well intitled to an action, in order to compel her to fulfil the contract undertaken upon her account, and which has proved ſo advantageous; nor can any evil conſequence follow from giving a reaſonable gratification, where it is plainly for behoof of the ward to do it.

Triplied for the defenders: The laws of other kingdoms can have no influence in this queſtion; as every country has its own maxims, and follows thoſe rules, experience has ſhown to be attended with the feweſt inconveniencies. In *Scotland*, the rule of the common law has conſtantly been followed, *viz.* That tutory is a gratuitous office; which has not been productive of any bad conſequences; but, ſhould it be changed, it is not eaſy to foreſee what effects ſuch alteration might produce. It is true, that the office was attended with extraordinary trouble, in the view of which the contract was entered into with Sir *Alexander*; and likeways that the defender has reaped a far greater advantage thereby than the ſum now purſued for: but ſtill theſe are not ſufficient reaſons for breaking in upon the eſtabliſhed rules of law.

The Lords aſſoilzied the defenders.

N° XXIII. *Eodem Die.*

Alexander Macbrair contra *Grizel* and *Ann Maitlands.*

Paſſive Title of lucrative Succeſſor.

THE deceas'd *George Maitland* of *Eccles* having five daughters, granted different bonds of proviſion to them for 5000 merks each, payable at his death, in full of all ſucceſſion they could have in his heritable eſtate, *&c.*; containing clauſes diſpenſing with the not delivery.

In the 1702 he died, leaving behind him a ſon, who alſo died ſoon thereafter; whereupon the daughters entered into a tranſaction with Dr. *Maitland* their uncle, *anno* 1703, whereby they aſſigned to him their bonds of proviſion; in conſideration whereof, he gave each of them his bond for the like ſums; in the right of which, and of others which had been conveyed to him, he adjudged the eſtate of *Eccles*, *anno* 1706.

After this, he granted an obligement to his nieces; wherein he *bound himſelf to free them of their father's debts, they always granting renunciations to enter heirs to their predeceſſors in his favours, when required.*

The Doctor obtained poſſeſſion of the eſtate, in virtue of his adjudication; and, after his death, the ſaid *Alexander Macbrair*, as having right to an old proceſs of compt and reckoning againſt *George Maitland* and others, transferred it not only againſt the Doctor's heir, but likeways againſt the daughters as repreſenting the ſaid *George Maitland*: and a proof of the paſſive titles having been granted, when the ſame came to be adviſed,

viſed, the Lords found them not proven, ſo as to make the daughters univerſally liable. But, from the above ſtate of the facts, this queſtion occurred, Whether or not they were liable *in valorem* of the ſums received from their uncle?

The defence offered for them was: That they could not be liable; as they had not received payment out of any of their father's effects, conform to the deciſion 5th *July* 1666, *Laurence Scot*.

To which the purſuer *Anſwered:* That it was hard the debtor's eſtate ſhould be carried off by a contrivance betwixt the heir-male and the heirs of line; the firſt of whom pretending he was not liable, as his only right to the eſtate was in virtue of ſingular titles; and, with reſpect to the daughters, that they had not meddled therewith. But, when it is conſidered that Dr. *Maitland*, as their aſſigny, has carried off the eſtate upon an adjudication, chiefly founded on their bonds of proviſion, they ſurely muſt be held as lucrative ſucceſſors, as much as if their father had diſponed part of his eſtate to them. And, if this was not ſuſtained, it would be eaſy to evade that paſſive title altogether; for a father had no more to do but grant a bond to his apparent heir, who may tranſmit it to a third party, and he again adjudge; by which means neither the one nor the other could be reached.

In the *next* place, it is obvious, that the intention of parties was, That the Doctor ſhould have the eſtate, and his nieces, who had a right thereto, ſhould renounce; which implied a vendition or conveyance in his favours: therefore they ought to be liable to the extent of the ſums received, which they may very properly be ſaid to have received out of their father's fortune; ſeeing the onerous cauſe thereof was their renouncing to be heirs to him in their uncle's favours, whenever he ſhould think proper to require them.

With regard to the deciſion quoted for the defenders, it does not apply to this caſe; in ſo far as the heirs of line there had no right whatſoever to their predeceſſor's eſtate, the ſame being ſpecially provided to heirs-male; therefore, what was given to them was a mere gratuity. But here, as the daughters had an undoubted right, what they received was no gratuity, but a tranſaction, in conſequence of which they gave up what they had a title to claim.

Replied for the daughters: It is a new doctrine to plead, That a bond of proviſion to a daughter was a *præceptio hæreditatis*, or that ſhe could be liable *in valorem*, without proving that payment had been made out of her father's effects; ſeeing it is only in that caſe the creditor's fund of payment would be impaired: therefore the purſuer has no title directly to attack them. If indeed the regular method is followed, he ought to conſtitute his debt againſt the apparent heirs, and thereon adjudge, whereby he will be intitled to compete with or challenge the rights of other creditors, who, if they ſet up theſe bonds in competition, he may inſiſt to have them reduced or ſet aſide.

As to the gloſs put upon the Doctor's obligement, making it equal to an actual conveyance, there can be nothing more unnatural; ſeeing the plain meaning thereof, as appears from the whole contexture of it, is, that, in regard the daughters had got nothing out of their father's fortune, and that the Doctor was in poſſeſſion of it for payment of debts above the value, he, by way of gratuity to his neices, bound himſelf to relieve them of their father's debts, they always renouncing to be heirs, when charged by any of his creditors. Beſides, there is no evidence that they

they ever accepted of the obligation, or upon that account were obliged to renounce their father's ſucceſſion. Nor is the anſwer to the deciſion of any weight; as the *ratio decidendi* is allenarly founded on this principle, That the creditors were not prejudged by the renunciation, agreeable to which the defenders agree this queſtion ſhould be determined.

The Lords found the daughters not liable in valorem *of the ſums contained in their bonds of proviſion, in regard they got not payment thereof out of their father's eſtate.*

N° XXVI. *June* 17. 1736.

Thomas Brown contra *Samuel Muir.*

Homologation.

IN the reduction, upon the head of deathbed, betwixt theſe parties, of an obligement to diſpone a houſe,

The Lords found the defunct's eldeſt ſon, being the writer and witneſs to the deed, doth import his approbation thereof; and therefore aſſoilzed the defender.

N° XXV. *June* 24. 1736.

Legators of *John Caldwall* Merchant in *Barbadoes* contra *Thomas Caldwall.*

A Legacy of L. 20 Sterling *for a Suit of Mourning is preferable to other Legacies of Sums of Money, to the Extent of the probable Coſt of the Suit.*

THESE legators brought a proceſs, for payment of part of their legacies, againſt Mr. *William Caldwall* merchant in *Leith*, and which, after his deceaſe, was transferred againſt the ſaid *Thomas* his executor, as having ſome of the ſaid *John Caldwall*'s effects in his hands.

The defence offered was: That there being *L.* 20 *Sterling* left to each of the executors for mournings, the defender, who was one of them, was preferable for that ſum.

Anſwered: That the legacy of *L.* 20 to the defender was only a general legacy, as well as thoſe left to the purſuers; therefore all of them muſt come in *pari paſſu* upon the executry. Neither can the purpoſe for which it was to be applied vary the rule; ſeeing it is only mournings to ſuch as are in the defunct's family, and not to ſtrangers, that have a preference as part of the funeral-expences.

Replied: That, where there are ſpecial legacies left to certain perſons, and ſums of money to others, if the executry proves deficient, the ſpecial legacies ſuffer no deduction. Now, this was truly a legacy of a ſuit of cloaths, which the defunct appointed to be taken off by each of his exe-

cutors after his death: ſo that it is the ſame in effect, as if he had legated a ſuit of cloaths of *L.* 20 value to each of them; and when ſuch appointments as theſe are made by the defunct himſelf, they become part of the funeral charges, which, by the nature of the thing, muſt be immediately laid out, (as was the caſe here), at leaſt before any gratuitous legacy can be paid.

The Lords found the defender preferable for the mournings bequeathed, which they modified to L. 10 Sterling, *and* pari paſſu *as to the remainder.*

N° XXVI. *June* 25. 1736.

George Monro of *Lemlair* contra *Guſtavus Monro* of *Culrain.*

The Values in a confirmed Teſtament is the preſumed Value of Goods abſtracted, unleſs otherways proven.

UPON the death of Lady *Weſtertown*, *George Monro* of *Culrain*, who was her heir, imagining he was likeways her executor, took poſſeſſion of her ſilver plate, watches, rings, *&c.*: however, he granted a receipt, wherein he obliged himſelf to be accountable for the ſame to thoſe having the beſt right, without ſpecifying the weight or value.

After this, Lady *Lemlair* was confirmed executrix to her ſiſter Lady *Weſtertown*; but ſhe having likeways died ſoon thereafter, the ſaid *George Monro*, as having right from her, made an eik to Lady *Weſtertown*'s teſtament; wherein he gave up the plate, *&c.* at *L.* 536 *Scots* value; and then brought a proceſs againſt *Culrain*, in which he was decerned to deliver to the purſuer the *ipſa corpora* of the foreſaid goods. Soon after which, the defender died; whereupon the proceſs was transferred againſt his brother, the preſent *Culrain:* and the queſtion that occurred betwixt them, was, What rule ſhould be followed, in order to aſcertain the value of the goods in the receipt, ſeeing the late *Culrain* had diſpoſed thereof.

For the purſuer it was contended: That the eſtimate given up in the eik to the teſtament was a ſufficient proof; eſpecially as it has now become impracticable to have the value aſcertained any other way.

On the other hand, the defender urged: That no weight could be laid on the values in the teſtament; ſeeing that was purely the purſuer's aſſertion: and, if that was to be the legal rule, this abſurdity would follow, That, if he had given up the values at a much higher rate, the law would be the ſame. It is true, that, in confirmations, the valuations are uſually very low; eſpecially when the executor is accountable to others. But it is not to be ſuppoſed this purſuer would err on that ſide; as he is accountable to no body, poſſibly the values, as given up in the teſtament, would have been held as evidence againſt the late *Culrain in pœnam* of his contumacy for not delivery. But ſuch a proof, being of a penal nature, ought not to affect the heir, who cannot be preſumed contumacious in not exhibiting what he never had acceſs to ſee; therefore, as it is a *factum impreſtabile* as to him, all that can be demanded at preſent, is the *damnum et intereſſe*, when proved in a habile manner, which may eaſily be done, by appointing

appointing ſilver-ſmiths to examine the inventary; who, upon comparing the higheſt and loweſt ſizes of each ſpecies, might ſtrike a *medium*, whereby a value near to the true one would come out.

To this it was anſwered for the purſuer: That the narrative of the teſtament bears the ſame was faithfully given up; which being probably known to the late *Culrain*, it muſt have been a good proof againſt him, who did not exhibite the goods; of conſequence the ſame ought likeways to be ſuſtained againſt the heir, who does not perform what his predeceſſor was liable to: and the defender miſtakes the caſe, when he conſiders it as of a penal nature; ſeeing the action is the ſame againſt him as againſt the late *Culrain*, *viz.* That he ſhould be decerned in the juſt value of the goods abſtracted by his predeceſſor.

As to the propoſal anent ſilver-ſmiths being appointed to appretiate according to a *medium*, that is now impracticable; as no man without ſeeing them can form any notion of the value.

The Lords found that the value in the confirmed teſtament is the preſumed value, unleſs otherways proven.

N° XXVII. *June* 29. 1736.

Patrick Vanſe contra *John Vanſe*.

1. *Aliment furniſhed by a Father to an Infant, does it compenſate his Intromiſſion with the Son's Money?* 2. *If ſuch Intromiſſion as Adminiſtrator in Law ſubjects him to Annualrent?*

THE deceas'd *Colonel Vanſe* having ſettled his eſtate upon his iſſue of a ſecond marriage, the ſaid *Patrick Vanſe*, his eldeſt ſon and heir, brought an action againſt them as heirs of proviſion; one of the articles of which, was a claim he had againſt his father for intromitting with ſome pay due to him while an infant, as an Enſign in a regiment, to which the Colonel was paymaſter.

The defence proponed againſt this demand, was: That his father had alimented him in his family, which behoved to compenſate the pay. But the Lords found the aliment preſumed to have been furniſhed *ex pietate*; and therefore could not compenſate or extinguiſh the claim. After obtaining this judgment, he inſiſted, in the next place, That the Colonel having received that money as tutor and adminiſtrator in law to him, behoved likeways to be accountable for the annualrents thereof from a year after the ſeveral dates of his intromiſſions.

Anſwered for the defender: That there was a great difference betwixt a father, who acts as adminiſtrator in law, and other tutors; ſeeing he is not liable for omiſſions, whereas they are: and that ſuch is the caſe, is a neceſſary conſequence of the act 1696; for, as he has thereby a power to name tutors and curators with that quality, he muſt be ſuppoſed to act under the ſame character himſelf.

2*do*, *et ſeparatim*, tho' it has been found, That the aliment furniſhed by the father to the ſon does not extinguiſh his claim to the pay; yet it does not follow, that the aliment furniſhed by the father does not exhauſt the claim

claim for intereſt: for, if the father ſhall be ſuppoſed ſubject to annualrents, it is impoſſible to imagine that he deſigned to aliment his ſon *gratis*. Nor will the law impute the aliment to the *pietas paterna*, if the ſon had a fund bearing intereſt: and, altho' it might have had ſome influence in determining the firſt point, That the aliment given to an infant bore no proportion to the pay; yet that circumſtance is of no weight in this queſtion, ſince it muſt far exceed the intereſt claimed: nay, a tutor, in the common caſe, is only liable to lay out his pupil's rents at intereſt, in ſo far as they exceed the expences of his aliment. And it has been found, That a father is not obliged to pay the annualrent of a legacy belonging to his ſon which was uplifted by him, ſeeing he alimented him, 15th *December* 1668, *Windram*.

Patrick Vanſe replied: That his father was liable to the ſame duties and obligations in every reſpect with other tutors; as was determined 4th *February* 1665, *Beg*; where it was found, That the father was liable for annualrent of his own third of moveables, which his ſon claimed in the right of his mother: and the ſame thing ought to take place here; as it would not be denied, that the Colonel laid out the money profitably, either upon annualrent or purchaſing land. Neither can the difficulty, with reſpect to the aliment which occurred in determining the firſt point, have any influence upon this; ſeeing, however that had been decided, ſtill this demand, with reſpect to the annualrents, would have remained, at leaſt in part.

The Lords found both defences ſufficient to liberate from the claim of annualrents.

N° XXVIII. *Eodem Die.*

Sir *John Rutherford* of that ilk contra *Walter Scot*.

Is a Purchaſer from a Tenant liable for the current Year's Rent, if enough was left at the Time of the Bargain to anſwer the ſame, but which the Maſter thereafter pointed for former Arrears?

SIR *John* ſet his lands of *Arks* to *Thomas Thomſon* for 1250 merks yearly, payable at *Martinmaſs* and *Whitſunday*, by equal proportions. At *Martinmaſs* 1733, the tenant having fallen in an arrear of *L.* 71 *Sterling*, payable at the *Whitſunday* preceeding, Sir *John* took a decreet againſt him in his own Baron-court upon 28th *November* that year, not only for the *L.* 71, but likeways for the rent due at *Martinmaſs* then paſt, and *Whitſunday* enſuing, the laſt of theſe being firſt come and bygone.

In the *March* thereafter, the tenant ſold 280 ſheep to *Walter Scot*, *&c.* Soon after which, Sir *John* pointed *Thomſon*'s effects; and having imputed the ſame in payment of the arrears, he inſiſted in an action againſt the purchaſers of the ſheep, for the years rent betwixt *Whitſunday* 1733 and *Whitſunday* 1734, upon this *medium*, That they were hypothecated for that year's rent; concluding, the defenders ought either to reſtore them, or pay the rent.

For

For the defenders it was *pled:* That, when they purchaſed the ſheep from the tenant, and paid the price, there were ſufficient goods upon the ground to pay that year's rent, which the purſuer had carried off in virtue of his poinding; and tho', by the common law, there was a great variety of legal hypotheques, yet theſe were in a great meaſure ſuperſeded by modern cuſtoms, being inconſiſtent with trade or commerce: As they are therefore ſo little favoured at preſent, it follows, that, as the hypotheque of an *univerſitas* was, by the *Roman* law, extinguiſhed by alienation, where it was done without fraud, *multo magis* behoved it to be ſo in our general hypotheque of *invecta et illata.* Neither is it any objection to this doctrine, That corn and other fruits of the ground could be recovered from a purchaſer; ſeeing theſe are reckoned, when growing, as part of the lands, and become the tenant's only by reaping them, with conſent of the maſter, which is underſtood to be given conditionally, upon payment of a certain *quota* thereof to him. But the *invecta et illata* ſtand upon a different footing, not being conſidered as belonging to the maſter, nor the rent payable out of them, but allenarly in money that is ſuppoſed to be raiſed out of the price thereof when ſold.

2*do*, *et ſeparatim*, General hypotheques go no farther than is neceſſary for that end; ſo that, if a part remains with the tenant, the purchaſer of the other part is only liable *in ſubſidium*, in ſo far as the remaining goods are inſufficient to anſwer the debt; which is founded upon the *L.* 47. *De jure fiſci.* 4. *novel. cap.* 2.: hence it follows, That a purchaſer from a tenant, as he is only liable *ſubſidiariè*, has a legal right, upon payment of the rent, to demand an aſſignation of the action competent to the maſter, againſt the poſſeſſors of the goods he left with the tenant, even tho' it ſhould be prejudicial to himſelf; a demand, which, it is acknowledged, would not be competent, was it only founded on equity: nay, even without ſuch an aſſignation, the defender has a right of relief, which is no more than a conſequence of the benefit of diſcuſſion.

Anſwered for Sir *John:* That there was nothing to hinder a maſter to poind for the rents of former years, and likeways uſe his right of hypotheque: ſo that both of them might be available to him for their reſpective purpoſes, agreeable to *Stair*'s opinion, *L.* 4. *tit.* 25. § 2.: where it is obſerved, That it is not enough there were ſufficient goods on the ground at the time of the poinding; becauſe poinders might carry off theſe goods, *and likeways the maſter of the ground might poind the ſame for prior rents.* But ſtill there ſhould remain a ſufficiency for a year's rent at the term of payment, tho' he himſelf, before that time, poinded the goods for payment of former years rents. And, to maintain the purſuer could not recover the ſheep after they were ſold to a purchaſer, is arguing in direct contradiction to the conſtant courſe of deciſions, 3d *February* 1624, *Hays*; 11th *December* 1672, *Crichton*; 9th *February* 1676, *Park.*

And, if the diſtinction betwixt the fruits of the ground and the *invecta et illata* was to take place, there would be no ſubject to fall under the hypotheque in all the ſouth country or *Highland* rooms in *Scotland*; as they produce nothing but graſs to feed cattle or ſheep, which, as they are the ſtanding ſtocking on theſe farms, muſt be conſidered as the fruits thereof. Nor does it make any difference, That the rent is not paid in the goods themſelves, but out of the price; ſince that is now the caſe with moſt of the corn-farms; and yet the hypotheque in theſe is as ſtrong for the money-rent, as if it were payable in kind.

To the *ſecond* defence it was *anſwered:* That one is not bound to aſſign a debt to his own prejudice, whether the demand is founded in law or equity; and, if there was any right to demand it in this caſe, it could only ariſe from equity. Neither is the doctrine of aſſigning to be reſtricted to what obtains with reſpect to cautioners, that being an acceſſory obligation, whereby the cautioner is not properly bound for the debt, but for the debtor: ſo that the preſent caſe is very different; as all intromitters with the tenant's goods are equally and principally liable for payment of the year's rent. The *ſubſidium* therefore now in diſpute is of a quite different nature, and relates only to the order in which the principal debtors may be attacked; as *Sand* obſerves in his treatiſe *De actionum ceſſione, cap.* 5. § 35. and 36.; where a general rule is laid down, That one is not bound to aſſign when it is to his own prejudice: hence it is, that a creditor, who has a pledge for two ſums, is not bound to aſſign it to a cautioner in one of the debts, unleſs he pay both; becauſe ſuch aſſignation would be to his own prejudice.

The Lords, found, That the defenders, as lawful and onerous creditors to Thomas Thomſon *the tenant, having* bona fide *received the ſheep in payment of their juſt debts, are not obliged to reſtore the ſheep, or their values, to the purſuer, by virtue of his hypotheque; in regard it appeared, That goods ſufficient to pay the current year's rent were left upon the ground, which afterwards were intromitted with by the purſuer; and repelled the alledgeance, That the ſame were pointed for former arrears, in regard the hypotheque does extend to no more than the current year's rent; and therefore that the purſuer could plead no preference for former years againſt other lawful creditors, but according to his diligence.*

N° XXIX. *June* 24. 1736.

James Brown of *Carſeluith*, contra *Iſobel Muir* and her Husband.

A Bond, wherein two Perſons bind themſelves and their Heirs, in caſe they had occaſion to ſell Lands, to diſpone the ſame to another, whether valid or not?

THE deceas'd *Robert Brown* of *Carſeluith*, with conſent of the ſaid *James* his ſon, granted an obligement to the alſo deceas'd *John Muir* of *Craig*, bearing, in the narrative, That he having advanced the ſum of 16000 merks for relieving them of certain debts, upon the expreſs condition, That, in caſe they ſhould at any time thereafter have occaſion to ſell the lands of *Kirkmabrecks*, *&c.* then they ſhould diſpone the ſame to him and to no other: after which follows the obligatory clauſe, "Where-"by they bind and oblige themſelves, their heirs, *&c.* That, in caſe at "any time they had occaſion to ſell the ſaid lands, they ſhould diſpone "the ſame to him and his heirs (ſecluding aſſignies) and to no other per-"ſon whatſoever, he always paying 17000 merks, as the agreed price "thereof,

" thereof, whereof the ſaid 16000 merks to be in part, in caſe it was not " paid before the time of ſuch ſale."

Of this deed, *James* raiſed a reduction after his father's death, as being an uſurious and unlawful bargain adjected to a loan of money; in which this ſeparate queſtion occurred, How far the obligation to ſell, being indefinite as to time, can have a perpetual endurance?

For the purſuer it was *argued:* That, by the expreſs tenor of the clauſe, the obligation was perpetual; ſeeing the obligants had bound themſelves, *&c.* That, if they had occaſion to ſell the lands, they ſhould diſpoſe of them to the ſaid *John Muir*; which was ſurely an unlawful paction, as it reſolved in an interdiction not authoriſed or known in law. Beſides, it is contrary to the common liberty of mankind, that one ſhould aſtrict himſelf with reſpect to ſelling his eſtate to a particular perſon or family; for, while one remains proprietor, it would ſeem inconſiſtent with the nature of property, that he ſhould lie under ſuch an embargo. It is true, there are inſtances in law where ſuch pactions are ſuſtained: thus, in the *L.* 75. *ff. De contrahen. empt.* a paction adjected to a ſale, That, if the purchaſer ſhall have occaſion to ſell the thing again, he ſhall diſpoſe of it to no other than the firſt ſeller, is valid. Such is the caſe likeways where any perſon has the privilege of pre-emption, as the ſuperior in emphetutical rights: but in theſe, and many others that might be mentioned, the party who is preferable behoved to give the current or market price for it, and not pretend to take it for a ſum covenanted at the time of the bargain; ſeeing, from the nature of ſuch a paction, the ſubject may not be diſpoſed of for many years: ſo that a remote heir, when he comes to ſell it, may not draw the tenth part of the value; as the price of things vary every day, which is really the preſent caſe; as the value of theſe lands are now far greater than the ſum agreed on.

For the defenders it was obſerved: That the narrative of the obligation ſeems to point as if it had not been intended to be perpetual; ſeeing it ſets forth, That in caſe *we, or either of us, have occaſion to ſell the lands, &c.* which are words that can only apply to the two obligants. Nor is it any objection to this conſtruction, That, in the obligatory part, they not only bind themſelves, but their heirs: for, altho' a man oblige himſelf to do any thing in his own life, yet, notwithſtanding thereof, he uſually binds himſelf and his heirs that he ſhall do ſo; the conſequence thereof is, That, if he contraveen, the heir will be liable in damages, and obliged to procure to be undone what his predeceſſor did. Now, to apply this to the caſe in hand, if the obligants here had ſold the land to another, and then died, the heir would be bound to make good the damage, and to procure the ſame to be undone: but, granting that it was perpetual, there is no force in the objection; ſeeing there is nothing inconſiſtent with the liberty of mankind, that one ſhould lie under a perpetual obligation not to ſell but in favours of one family, ſuch being the import of every clauſe of redemption; and, if a man can lawfully bind himſelf, Why cannot he, in the ſame way, bind his heirs? Nay, there does not ſeem any thing to ſtand in the way of a man's obliging himſelf and his heirs not to ſell at all, which is truly the caſe of entails; as it is the natural conſequence of property, that every perſon may ſubject it to what conditions and limitations he pleaſes.

As to the diſtinction, That ſuch bargains are not valid, if the price is fixed at the beginning, it is without any foundation or authority whatever:

if

if indeed the right of pre-emption ariſes from law and not by paction, then no price can be fixed; and, of conſequence, the current price, at the time of the ſale, muſt be the rule. But it would prove a ſtrange reſtraint upon property, if a perſon, who intended to ſecure to himſelf a certain price in the event of an eventual ſale, ſhould not have it in his power to do it. Nor is it to the purpoſe to mention the chance of land's riſing in value; as the hazard of its falling lies on the ſide of the buyer.

The Lords found the obligation was no longer binding than during the life of Carſeluth *and his ſon, the obligants.*

But, upon petition and anſwers, founded on the objection, That the contract of ſale was unlawful, by being adjected to a loan of money,

The Lords found the contract, in ſo far as concerned the ſale, contra bonos mores; *and therefore not binding.*

N° XXX. *July* 8. 1736.

John Walkinſhaw Merchant in *Glaſgow*, contra His Majeſty's Advocate.

Objections to an Attainder, 1. *Miſnomer in the Sirname.* 2. *Error in the Deſignation.* 3. *Want of the Myſtery or Calling.*

IN the proceſs, at Mr. *Walkinſhaw*'s inſtance, againſt Meſſrs. *Crawford* and *Corbet*, merchants in *Glaſgow*, to account for the profits of a rope-work company, whereof he was a partner, the defenders moved this objection; That, by an act of the firſt year of the reign of his late Majeſty, *Wakinſhaw* of *Scotſtown*, the purſuer, was attainted of high treaſon, whereby he had loſt his intereſt in the company.

Anſwered for the purſuer: If that act was intended to attaint him, it was defective in ſeveral particulars: 1*mo*, In the ſirname, his name being *Walkinſhaw*, and not *Wakinſhaw*. 2*do*, In the deſignation of the place where he lived, which was *Glaſgow*. 3*tio*, In the want of the addition of his myſtery or calling, which was *merchant in Glaſgow*.

And, with reſpect to the firſt of theſe, it was obſerved: That, by the *Engliſh* law anent treaſon, which is extended to *Scotland* by the act 7*mo Annæ*, the greateſt exactneſs and certainty is requiſite in attainders; nor is any thing left to be ſupplied by implication, in ſo much that the omiſſion of a ſingle letter has been found fatal to indictments. Thus, in *Raſtal's Entries*, *fol.* 279. there are two inſtances of ſmall miſnomers, which yet were ſuſtained to caſt the indictments: the one was *Royle* in place of *Ryle*; the other *Comfry* in place of *Comfreys*. And, in the ſame place, it is remarked, That an outlawry was reverſed, becauſe the ſirname was wrote *Fee* and not *Fy*, which was the pannel's true ſirname. In the trial likeways of *Francis Francia*, *Henry Greenway* was called as a jury-man; and, upon its being objected, That his name was *Greenaway*, he was ſet aſide, *State Trials*, *vol.* vi. *p.* 59. All which apply directly to the caſe in hand; as the purſuer's ſirname is not *Wakinſhaw*, but *Walkinſhaw*, which are as different

different from one another, as *Brodie* is from *Bodie*, *Leith* from *Leitch*, or *Williſon* from *Wilſon*; in which the omiſſion of a letter makes a different name.

In the *ſecond* place, the attainder is informal with reſpect to the deſignation; in ſo far as, by the *act* 1. *Henry* V. *cap.* 5. it is neceſſary, that unto the name of the perſon indicted, muſt be united the addition of his eſtate, degree or myſtery, and the ſhire, town, or hamlet, where he dwells; otherways the indictment is void. Now, if by the words *of Scoſtown* be meant his ſtile, it does not apply to the purſuer, as he was not infeft in any lands at the date of the attainder; and a ſtile without infeftment is only courteſy, which is inſufficient to ſupport an indictment: *ex. gratia*, an Earl's eldeſt ſon is, by courteſy, a Lord; but, if he ſhould be attainted under his common name of Lord, the attainder would be null; and, if the words *of Scotſtown* are intended to mean the place of his reſidence, it does not apply; becauſe, at that time, he reſided in the town of *Glaſgow*.

3*tio*, By the above act of *Henry* V. the addition of the pannel's myſtery or trade muſt be united to the name of the perſon indicted; otherways any proceſs thereon is void and null: from whence it follows, That, as the purſuer was a merchant in *Glaſgow* at the date of the attainder, the addition of his myſtery ought to have been mentioned, otherways it cannot legally have any effect againſt him. See the caſe of Sir *William Hicks* in *Ventry's Reports*, *p.* 154.

To which his Majeſty's Advocate, who appeared in behalf of the Crown, replied: That there is a material difference betwixt a miſnomer, where the deſcription of the perſon attainted does evidently not ſuit with the perſon againſt whom it is made uſe of, and an accidental ſlip in ſpelling. In the firſt caſe, where the name and ſirname does not belong properly to the perſon againſt whom it is uſed, but might juſtly apply to another, the attainder may not be effectual againſt him to whom it is not ſo properly adapted: but, in the latter caſe, where theſe belong to the party, and none elſe, inaccuracy in writing or ſpelling can make no material error in the attainder, if ſuch miſtake does not vary the ſenſe or deſcription of the party. Now, as to the pretended difference in the ſirname *Walkinſhaw*, *ſcil.* That it was written in the act of Parliament without an *l*, that is ſurely too ſlight a reaſon for evading an attainder; ſeeing it is wrote in the act as it is uſually pronounced in this country, where the letter *l* is never uſed before a *k*; and inaccuracies of this ſort have been often over-ruled: Thus, in the trial of the regicides, *Henry Martin* having pled the act of oblivion, out of which he was excepted by the name of *Henry Martin*, on pretence that he was not the perſon excepted, his real name being *Harry Marten*, the Judges paid no regard to that plea; *quia conſtitit*, that he was the perſon deſcribed, and was commonly called and known by the name of *Henry Martin*. And, in the trial likeways of *Chriſtopher Lawyer*, exception being taken that his Chriſtian name was written *Chriſtopherus*, whereas it ought to have been wrote *Chriſtophorus*, the objection was overruled. And, if ſuch topics were to be liſtened to, it would be impoſſible to proſecute any offender, until with certainty it was diſcovered, how he uſually wrote his name, which even varies among perſons of the ſame ſirname. With reſpect to the inſtances adduced for the purſuer, where the addition or defect of a letter make a conſiderable difference in the ſirname, they are not to the point; as ſuch alteration changes the word from one

firname to another, which is not the caſe betwixt the words *Wakinſhaw* and *Walkinſhaw*.

To the *ſecond* obſervation it was *anſwered:* That his father *William Walkinſhaw* of *Scotſtown* being dead before the attainder, the addition of *Scotſtown* was a proper deſcription of him according to the common uſage in this country; as he was his only ſon, and which, by the eſtabliſhed cuſtom, is always given to the eldeſt ſon after his father's deceaſe, without regard to his being infeft or not: ſo that, it is believed, it would have been an error in the attainder, if he had been deſcribed by the addition of merchant in *Glaſgow*, as he more properly belonged to the claſs of landed men.

To the *third*, it was *anſwered*, 1*mo*, The meaning of the ſtatute is no more than to make the perſon certain, by deſcribing the man by his name, firname, and eſtate, if a landed perſon; ſo as one man might not be troubled for another. *Vid. Cock's Inſtit. part* 2. *p.* 270. 2*do*, Whatever operation the ſtatute may have upon outlaweries, it cannot apply to a parliamentary attainder, where the authority of the legiſlator diſpenſes with all forms, and muſt be confeſſed to make the ſame abſolute, where-ever the perſon is ſufficiently deſcribed: but, at any rate, theſe objections come too late; as the purſuer has not only allowed his eſtate to be ſeized and ſurveyed, but likeways has obtained a pardon from his Majeſty, whereby it is evident he underſtood himſelf to be deſcribed by the act.

The Lords found there is no miſnomer of the ſaid act, with reſpect to the name and deſignation of John Walkinſhaw *of* Scotſtown; *and therefore repelled the alledgeance founded thereupon.*

N° XXX. *July* 14. 1736.

The Creditors of Sir *Patrick Strachan* of *Glenkindy* contra *Charles Baldwin* Eſquire.

Law of Deathbed.

SIR *Patrick Strachan*, on deathbed, executed a marriage-contract, whereby he granted an annuity of *L.* 100 *Sterling per annum*, out of his eſtate, in which he was infeft, to *Elizabeth Auldgood* his wife, with whom he had been married for ſeveral years: and, on the other hand, the Lady therein diſponed to him a ſmall eſtate ſhe had in *England*, renouncing likeways in his favours her *parapharnalia*, jewels, *&c.* It was further provided, That, in caſe ſhe happened to ſucceed to any friend in an eſtate of a hundred pounds a-year, the jointure was to go to her own children; and on this contract ſhe was infeft.

Upon Sir *Patrick*'s death, the Lady married Mr. *Baldwin*, who, during the marriage, commenced a proceſs of poinding the ground, for recovering her annuity; which he inſiſted in after her death, as having right to the bygones *jure mariti*.

But Sir *Patrick*'s creditors, who adjudged the eſtate from his apparent heir, brought a reduction of the Lady's proviſion, as granted on deathbed: againſt whom it was pled, for Mr. *Baldwin*, 1*mo*, That, as the heir could

could have no title to inſiſt in the objection of deathbed, ſeeing he would have been excluded by the debts, which exhauſted the eſtate (altho' the annuity had not been granted); therefore it was not competent to the creditors, who came in his right, to plead it. 2*do*, Suppoſing they had a title, yet, as the proviſion was in favours of a wife, it could not be ſaid to be in prejudice of the heir; ſeeing it was both onerous and rational, founded not only on the antecedent obligation which lay upon the huſband to provide for her, but likeways upon the onerous preſtations on her part, which are, *per ſe*, a ſufficient defence againſt deathbed; as it has been found, That an heritable bond of corroboration of a moveable debt is not reduceable *ex capite lecti*, 18th *January* 1709, *Darling*. Nay, the marriage itſelf was an onerous cauſe for granting the annuity; in conſequence whereof it follows, that a jointure given after marriage is not reckoned a donation, but onerous, and therefore not revocable: or, abſtracting from the oneroſity of the deed, the natural obligation upon a huſband to provide his wife is ſufficient to ſupport the annuity. It is true, proviſions to children fall under the law; but there is a great difference betwixt the two caſes: for, with regard to the firſt, there is both an antecedent natural obligation and onerous cauſe, *ſcil.* The marriage for ſupporting the proviſion to a wife; whereas it is doubtful if there is any natural obligation to provide children; and, for certain, there is no antecedent onerous cauſe.

But, 3*tio*, a jointure, in ſuch a caſe as this, where the huſband was infeft, and conſequently the wife intitled by law to a terce, can never get the name of a deed in prejudice of the heir, if the proviſion did not exceed a *rationabilis tertia:* for it is no prejudice to the heir to change the form of the wife's jointure, from that of a terce to a voluntary proviſion; on the contrary, this annuity might have proved an advantage to Sir *Patrick*'s heir, ſince it was only to ſubſiſt until ſhe ſucceeded to *L.* 100 a-year, of which ſhe had then a proſpect, by the death of a near relation. And, in queſtions where a jointure has been quarrelled, as granted without ſuitable powers, if there might have been a terce competent to the wife, the voluntary proviſion has been ſuſtained to the extent of a *rationabilis tertia*; as in the caſe betwixt Mrs. *Borthwick*, widow of *Hartſide*, and *Borthwick* of *Crookſton*.

Replied for the creditors: It is an eſtabliſhed point, That a man on deathbed can do no deed whatſoever to the prejudice of his heir; and, as it would have been competent to him to reduce the liferent, it is equally ſo to the creditors, who have denuded him by their diligence. Nor does it make any alteration, whether the eſtate is exhauſted by other debts or not; ſeeing every deed, by which it is burdened or alienated, is certainly prejudicial to the heir, who is intitled to his predeceſſor's eſtate free of that burden, and to detain it upon paying or tranſacting the debts contracted in *liege pouſtie:* ſo that the donee, by the deathbed-deed, is not concerned, whether the reverſion that falls to the heir be more or leſs.

In the *ſecond* place, as Sir *Patrick* knew he was *oberatus*, and that his eſtate was not ſufficient to anſwer his debts, it was directly *in fraudem creditorum* for him to give ſuch an exorbitant proviſion out of his eſtate which does not exceed 3000 merks a-year: ſo that, *eſto* it had been granted in *liege pouſtie*, it was reduceable upon the act 1621: for this is not like the caſe where a contract is entered into before marriage, which is ſupported by the marriage following upon the faith of it, and where the Lady is preſumed

preſumed ignorant of her future ſpouſe's circumſtances. But here this ſimulate contract is entered into ſeveral years after the marriage, when the Lady cannot be ſuppoſed ignorant of her huſband's ſituation; and, in ſo far was *particeps fraudis* in taking any ſecurity from him beyond what the law gave her a right to: but there is no occaſion here to enter upon ſuch an argument; as this reaſon of reduction is ſo plainly founded in law, and which admits of no exception, upon account of the rationality of the deed; in ſo much that bonds of proviſion by a father to his children, which are as rational as any proviſion to a wife, if not more ſo, as the law ſecures her in a terce, are reduceable *ex capite lecti*: ſo it was decided *July* 1721, Sir *James Fowles*.

Neither does the onerоſity of a deed exeem it from this objection; for what is more onerous than a ſale? yet it is void when executed on deathbed: *Nemo poteſt hæreditatem vendere in lecto ægritudinis*, ſays the law of *Majeſty*; agreeable to which it was adjudged *July* 1635, *Richardſon*. As to the deciſion in the caſe of *Darling*, the *ratio decidendi* there was, That the heir had no prejudice by the deed: how far this was a good reaſon, the purſuers have no occaſion at preſent to inquire, or to enter upon theſe general topics, as there was here no onerous cauſe for granting the proviſion; for the conveyance of the *Engliſh* eſtate, by the Lady to Sir *Patrick*, was no more than a *color quæſitus* to make the appearance of onerоſity; as it does not appear that ſhe had any right to it herſelf.

As to the *third* obſervation, That the liferent ought to be ſuſtained, at leaſt to the extent of a terce, it falls to be obſerved, That there is a very wide difference between theſe two rights, a terce being no more than a right to the fruits; whereas an infeftment of annuity affects the fee. And, altho' the Lady might have inſiſted upon her terce, either againſt the tenants or intromitters with the rents, as may the defender her aſſigny; yet he cannot, in virtue of the terce, affect the fee of the eſtate, for rents which ſhe ought to have uplifted during her own lifetime. Nor is there any ground to ſupport the annuity as a ſecurity for the terce, as if the heir and creditors had no harm by it; ſeeing their prejudice is manifeſt, if a right to the rents is turned into a burden upon the property, and the relict gets liberty to ly ſtill and allow the rents to be run away with, which ſhe had a title to uplift, and thereafter to come and be ranked on the fee to the excluſion of creditors. But it is plain, a perſon on deathbed has no power to make ſuch a tranſmutation of right to the prejudice of his heir or creditors.

And, with regard to the clauſe declaring, That the jointure ſhould ceaſe in caſe ſhe ſucceeded to *L.* 100 *Sterling* a-year, it is *anſwered*, That, if one in ſuch circumſtances cannot make the plaineſt bargains for his heir, much leſs can he make bargains of chance. Beſides, even in that event, the Lady was only to give down her liferent to her own children, but ſtill it was kept up againſt the creditors; ſo that that clauſe does not appear to concern the preſent queſtion.

The Lords ſuſtained the reaſon of reduction, in ſo far as the annuity could affect the fee of the eſtate.

N° XXXI.

N° XXXI. *July* 16. 1736.

William Nicol contra *Walter Groſſet.*

A Tenant overgiving a Houſe within a Burgh of Barony, forty Days preceeding Whitſunday, *is ſufficient; altho', by the univerſal Cuſtom of the Burgh, it is always done upon the firſt* Monday *of the Year.*

MR. *Groſſet* having poſſeſſed a houſe in *Alloa* for ſome years, intimated to Mr. *Nicol* the proprietor, above forty days preceeding *Whitſunday* 1733, that he intended to remove at that term; which accordingly he did: but, the houſe having ſtood waſte for the year after his removal, *Nicol* brought a proceſs againſt him before the Sheriff of *Clackmannan* for payment of the year's rent, upon this ground, That, thro' *Groſſet*'s default to overgive his poſſeſſion upon the firſt *Monday* in the year, conform to the immemorial cuſtom of the inhabitants in the burgh, he had loſt the opportunity of ſetting his houſe to another tenant. And, upon *Nicol*'s proving the cuſtom, he obtained a decreet; which *Groſſet* ſuſpended, on this reaſon, That, by the *Act* 39. *Parl.* 6. *Queen Mary*, which behoved to be the rule in this caſe, he was not bound to renounce his poſſeſſion ſooner than forty days before *Whitſunday*.

Anſwered for the charger, 1*mo*, The act ſpeaks not one word how tenants ſhould give over their poſſeſſions. 2*do*, It aſcertains the order of warning of tenants as to *prædia ruſtica*; but, as to the *prædia urbana*, that matter is left to be regulated by the cuſtom of the ſeveral boroughs, which, altho' different among themſelves, there is ſtill a cuſtom in each, which is the rule for that borough. And this is obvious from the following words of the act, directing, " That tenants ſhould be warned to remove from their " lands, milns, fiſhings, and poſſeſſions, forty days before *Whitſunday*, " perſonally, or at their dwelling-places, and at the ground of the lands." Words which would have been very improper, if tenements within burghs were deſigned to be comprehended; as there is uſually no other ground belonging to them but what is occupied by the houſes. And *Stair*, *p.* 322. ſays, " The ſtatute reaches not warnings from tenements within burgh, " which are regulate by the cuſtom of the burgh." And, in ſupport thereof, he refers to two deciſions, 18th *July* 1634, *Hart*; 21ſt *November* 1671, *Riddel*.

Replied for the ſuſpender: To the *firſt*, The words of the law are general, " That warnings of all tenants and others ſhall be by lawful warn- " ing, made forty days before *Whitſunday*." And if ſo, That the maſter was not bound to warn the tenant till forty days before *Whitſunday*; of conſequence the tenant was not obliged to renounce his poſſeſſion ſooner.

To the *ſecond*, It is a miſtake to ſay the act does not extend to tenements within burgh; ſeeing, as the words are general, theſe muſt always be the rule; except where it is derogated from by a poſterior univerſal cuſtom, which can take its riſe only from the reaſon of the law ceaſing in certain circumſtances: *e. g.* The act requires publication at the pariſh-church, which is not introduced ſo much in favours of the tenant, who may be ſufficiently certiorated by the copy left at his houſe, and upon the ground of the lands, as in favours of ſub-tenants and cottars, who are

thus warned edictally, becauſe the other may not reach them; and which therefore is plainly not neceſſary within burgh, as was found in the deciſion firſt referred to. But in other points the ſtatute is in obſervance within boroughs: thus an execution, by chalking the door of a houſe within burgh, is, in effect, a copy left at the dwelling-houſe, and alſo upon the ground of the lands; for they are one and the ſame thing: which is the meaning of the paſſage quoted from Lord *Stair*; not that the ſtatute does not concern burgage tenements, but only that it does not extend to them in all its branches.

As to the deciſion in the caſe of *Riddel*, it is not only ſingle, but very ſingular; for, if the act has made a warning forty days before *Whitſunday* neceſſary, only becauſe it was the uſual term of entry, then warning forty days before *Martinmaſs* would be ſufficient in corn-rooms, and forty days before St. *Andrew*'s day for fiſhings, theſe being the known terms of entry in ſuch caſes; but, the law being general, a warning before *Whitſunday* is neceſſary, whatever be the term of entry.

The Lords ſuſtained the reaſon of ſuſpenſion.

N° XXXII. *July* 22. 1736.

Margaret Douglaſs contra *John* Duke of *Argyle*.

1. *Interruption of the triennial Preſcription.* 2. Annus deliberandi.

ANNO 1704, *Colin Campbell* brought a proceſs before the Commiſſaries of *Edinburgh*, for cognoſcing that he was creditor to the deceas'd *Archibald* Duke of *Argyle*, for four and a half years wages preceeding *January* 1702, when he left the Duke's ſervice. After adviſing the proof adduced, the Commiſſaries decerned for *L.* 90 *Sterling*; and *Margaret Douglaſs*, as aſſigny to the decreet, brought an action, on the paſſive titles, for payment of the ſaid ſum, againſt *John* Duke of *Argyle*.

Amongſt other defences pled for the Duke, it was *argued*: That, ſuppoſing a paction or agreement for wages had been proved, which did not appear from the proof adduced, yet, by the *act* 83. *Parl.* 6. *James* VI. *Colin Campbell* could only have right to fees within three years of the citation before the Commiſſaries; and conſequently was intitled to no more than a year and a half's wages, the libel not being raiſed till the beginning of *December* 1704.

Anſwered for *Margaret Douglaſs*: That giving, but not granting, the act ſhould be ſo conſtrued, as to reſtrict the fees to three years before the citation; yet that muſt certainly comprehend all the fees that became due within three years backward; and therefore would carry a year immediately preceeding the three; for this plain reaſon, that the preſcription can never debar the ſervant from payment of that fee which became due within three years of the citation; and conſequently muſt comprehend the fee of one year further back than the three; becauſe a ſervant cannot purſue for the year's fee till firſt the ſervice is performed: ſo that, according to this computation, inſtead of one year and a half's fee, there will be two and a half due.

2*do*,

2*do*, It is acknowledged by the defender, That *Archibald* Duke of *Argyle* died in *October* 1703; of courſe, the year after that, as being the *annus deliberandi* indulged by law to the defender, to conſider whether he would enter as heir to his father or not, cannot enter *in computo* of the three years; becauſe, during that year, he could not be purſued *cum effectu*, as was found 16th *July* 1708, *Thomſon*. Setting then aſide this year, the purſuer is intitled to three years and a half fees: ſo that the remaining diſpute is *de minimis*, *de quibus non curat prætor*.

The Lords found the proceſs did only interrupt the preſcription, as to what fees fell due within three years of the commencement of the proceſs; and found the preſcription did run during the annus deliberandi.

N° XXXIII. *July* 30. 1736.

Margaret M'Ilvain and her Husband, contra *John M'Quhirter*.

A Tutor-Teſtamentor preferred to a Mother, as to the Cuſtody of her own Child, to which ſhe was intitled by her Huſband's Will, in reſpect of her ſecond Marriage, tho' the Tutor was next in Succeſſion.

PEter M'Quhirter, tenant in *Craigfad*, by his laſt will, appointed the ſaid *John* his brother to be ſole tutor to *Janet M'Quhirter* his only daughter; and therein provided, "That his ſpouſe ſhould educate and "entertain the child in every thing, according to her quality and ſtation, "till ſhe be of the age of twelve; for which he ordained his brother to "pay to the child's mother the yearly intereſt of her free ſtock."

After *Peter*'s death, *Margaret M'Ilvain*, his relict, married a ſecond huſband; whereupon the tutor required her to deliver up the child to him, under proteſtation, That ſhe ſhould have no title to any further ſum in name of aliment. However, ſhe refuſed to comply; and thereafter inſiſted, in a proceſs againſt the tutor, for payment of the aliment, which was about *L.* 26 *Scots* yearly, that being the yearly intereſt of the free ſtock.

For the tutor it was *pled:* That, as the mother had married a ſecond huſband, neither ſhe nor her father, to whoſe houſe ſhe had ſent her daughter, were proper perſons to have the cuſtody of the child's education; in ſupport of which the following caſes were quoted, 22d *February* 1631, *Finny*; *February* 1632, *Gordon*; 5th *February* 1675, *Fullarton*. And, rather than allow her to be taken out of the hands of her father's friends, he or his father offered to aliment her *gratis*.

Anſwered for the mother: The governing rule in this caſe ought to be the father's intention, who, by the teſtament, has preferred her as to the cuſtody of her daughter to the tutor. And, altho' that cannot be obſerved in the preciſe terms of the will, ſince her ſecond marriage, yet the next to that ought to be followed, *ſcil.* the allowing the infant to be educate with the purſuer's father.

2*dly*, As the tutor is next in ſucceſſion to the child, the law preſumes, that he will not take ſufficient care of preſerving her life; and, as his father

ther is in the line of ſucceſſion next to him, ſo ſome ſuſpicion lies likeways againſt him; therefore neither of them ought to be conſidered as fit perſons for that purpoſe. And, from the deciſions referred to, it appears, That, even when a mother offered to aliment her child *gratis*, no regard was paid to it: ſo that the tutor's making ſuch an offer cannot have any influence; eſpecially conſidering, that whoever does it muſt be a loſer, as the fund of aliment is ſo ſmall.

The Lords ordained the child to be delivered up to the tutor, and found no aliment due for the future.

Scougal, &c. Chargers, contra *James Gilchriſt*, Suſpender.

N° XXXIV. *November* 16. 1736.

No Action lies for Damages, on account of the Not-delivery of Goods ſold, if the Buyer knew, at the Time of the Sale, that they were prohibited or run.

THIS was a charge upon a decreet of the Bailies of *Edinburgh*, for the damages ſuſtained, thro' the ſuſpender's not-delivery of certain goods; ſuch as brandy, *&c.* ſold by him to the chargers.

For the ſuſpender it was *alledged:* That the goods in queſtion were ſold as run goods, which appeared from the prices, and whole circumſtances of the caſe; therefore he could not be liable in delivery thereof, or for any damages ariſing thro' not-delivery; ſeeing, by the 11th of *George* I. *chap.* 29. "It is provided, That, if any perſon ſhall expoſe to ſale pro-"hibited or run goods, the ſame ſhall be forfeited, and may be ſeized by "the party to whom the ſame ſhall be expoſed to ſale, or any officer of "the Cuſtoms, *&c.*; and that the perſon ſo offering to ſale ſuch goods, "ſhall alſo forfeit and loſe triple the value thereof." Whence it was contended, That the ſuſpender could not be liable to deliver thoſe goods, which the buyer, without payment of the price, could not only have ſeized, but likeways have ſubjected the ſeller to triple the value; that thereby the ſale was annulled by public law, and the expoſing thereof to ſale was a ſtatutory crime, ſubject to ſevere penalties, to which, by no law or equity, the ſuſpender could be compelled.

2*dly*, It is alſo provided, by the ſame ſtatute, "That all prohibited or "run goods, ſo bought by any perſon, ſhall in like manner be forfeited, "and may, after delivery to the buyer, be ſeized and taken from him by "the ſeller, or any officer aforeſaid; and the buyer, beſide forfeiture of "the goods, ſhall forfeit and loſe triple the value, *&c.*" Whence it was argued, It did likeways appear that the contract of ſale was annulled; ſeeing the ſeller was ſo far from being bound to grant warrandice to the buyer, that he might ſeize the goods himſelf, and have action againſt the buyer for triple the value; which is quite inconſiſtent with the ſubſtance of the contract of ſale.

Replied for the chargers: That the ſtatute does not make void the contract touching run-goods, which, however, could not have eſcaped the legiſlature, had it been intended. And, as to the above proviſions, 1*mo*, The forfeiture of the goods, and triple the value, is not in favour of the

perſon

perſon who ſeizes, but of the Crown; the act here entruſts the ſeller with a power to be exerced for the benefit of the public, which he may uſe or not at his pleaſure, and which does not at all impinge upon the preciſe obligation betwixt private parties. For, 2*dly*, let us ſuppoſe the goods actually delivered, and, upon that, ſeized by the officers of the public; ſurely it will not be pretended, that this would ſave the purchaſer from payment of the price: or, let us even ſuppoſe the goods were ſo ſeized by the ſeller himſelf, neither could this ſtand in his way to demand payment of the price, which became due upon delivery; and his afterwards ſeizing of the goods as an officer of the Cuſtoms or Exciſe might have done, could infer no *culpa* or blame to forfeit his price: if ſo, the conſequence is undeniable, That the ſeller ſhould be liable in damages, if he does not implement his bargain. 3*dly*, Admitting the forfeiture were to accreſs to the benefit of the perſon who ſeizes, even this would make no alteration; for, tho' the ſeller might ſeize the goods after delivery, yet the buyer has the very ſame thing to plead; he might ſeize before delivery, and ſo the benefit of the forfeiture accreſs to him, ſo far they are *in pari caſu:* and, if neither the one nor the other has done this; what remains, but that the bargain ſhould ſtand?

Duplied: That, tho' the ſtatute does not expreſsly annul ſuch contracts, yet it virtually does it, as above, and ſuperadds ſevere penalties. And, to the *firſt*, it was anſwered, That, by an expreſs clauſe in the act, the forfeiture and penalties are divided between his Majeſty and the ſeizer. To the *ſecond*, The preſent queſtion is not concerning the recovery of the price of run goods; for tho', perhaps, if the buyer had received and diſpoſed of the ſame, he would be liable for the price, yet that does not affect the preſent caſe; for, in many inſtances where the contract of ſale is void, yet the buyer will be liable for the price in point of equity. Thus, if a minor, without authority of his curators, or even a pupil, purchaſes goods and diſpoſes thereof to advantage, he will be liable for the price, tho' the contract was originally void: but the action, in ſuch caſe, does not ariſe from the contract, but from the natural ground of equity, that no perſon is allowed to profit by another's loſs. And it is abſurd to pretend, That, where the ſeller himſelf ſeizes the goods delivered, he could have action for the price; if the price was actually received, he might poſſibly retain it *in pœnam* of the buyer, tho' the ſtatute is ſilent on this head: but, for certain, it is contrary to the nature of a contract of ſale and warrandice therein implied, that the ſeller could ſue for the price, when he himſelf ſeizes the goods. And the preſent queſtion, is, if he can be obliged to the delivery thereof, or be liable in damages, if he fails therein, ſince he might have ſeized the effects immediately upon delivery.

To the *third:* The ſeller and buyer are indeed upon equal footing, as to the liberty of ſeizing the goods, and being intitled to triple value, *&c.*: all which plainly ſhows, That the contract is not binding upon the one party more than the other: ſo that, upon the whole, it is evident, that this act, in order to diſcourage the running of goods, has not only annulled contracts of ſale concerning the ſame, but likeways impoſed ſevere penalties upon the execution thereof.

The Lords found the reaſon of ſuſpenſion relevant, that the purchaſer knew, at the time of the ſale, that the goods were prohibited or run-goods, in terms of the act of parliament.

N° XXXV. *November* 24. 1736.

James Earl of *Roſeberrie* and his Creditors, contra Lady *Margaret* and *Dorothea Primroſes*.

Law of Deathbed.

Archibald Earl of *Roſeberrie*, after contracting the diſeaſe of which he died, diſponed part of his heritage to his younger children; of which the preſent Earl brought a reduction on the head of deathbed; and, a proof having been allowed to both parties, the ſubſtance thereof amounted to this, That the granter, ſome months before the date of the deed, was ſeized with a *diabetes*; but thereafter growing better, ſo as to be able to go about his ordinary affairs, he one day rode into *Edinburgh*, lighted at the *Graſs-market*, and from thence came up to the High-ſtreet, and walked at the Croſs for a conſiderable while, betwixt twelve and one o' clock: but, having rode out that evening to *Dalry*, he met with ſuch ſtormy weather by the way, as occaſioned his diſeaſe to return upon him, of which he died in a fortnight thereafter.

At adviſing the proof, it was *argued* for the Earl, *&c.* 1*mo*, The going to kirk and market unſupported, is not a *præſumptio juris et de jure* of convaleſcence; for, if there are evident tokens of the continuance of the indiſpoſition, it will be ſufficient to exclude the preſumption of recovery, ariſing from the party's going to kirk and market. So ſays Lord *Stair*, *p.* 601. " That the preſumption of convaleſcence, by public appearance " at kirk and market, may be elided by contrary evidence; particularly, " if there were evident tokens of the continuance of the ſickneſs, *&c.*" Now, if this is the law, ſurely a proof, as there is in the preſent caſe, (by the granter's phyſician and ſurgeon) that he had the diſeaſe upon him the day upon which he came to town, is ſufficient to take off the preſumption. 2*do*, Tho' going to kirk and market has been found a preſumptive evidence of reconvaleſcence, yet equivalents have not hitherto been admitted; for a party's going publickly abroad has not the ſame effect in law, as going to the kirk or market: *e. g.* To go to a field-conventicle, to a wedding, or to a court of juſtice, would not be equivalent to going to kirk and market; becauſe the law allows no other preſumptive evidence, but the going to kirk in time of Divine ſervice, or to market in market-time. Now, to apply to this the point in hand, it is not pretended that the defunct went to the kirk; and, with reſpect to the market, the Croſs is no market-place for any thing whatſomever: the town has ſeveral other places for ſelling commodities, and to which theſe muſt be brought before they are ſold; nay, perſons acting otherways are puniſhable. But, ſuppoſing it were a market-place, the defunct's coming there is not enough, unleſs it appear he came in market-time; for, if it was not the market-day, the coming to the market-place goes for nothing. Now, here the proof is ſilent what day of the week the defunct walked at the Croſs.

Anſwered for the diſponees: If by reconvaleſcence the purſuers mean an abſolute recovery, ſo as to be out of danger of dying of the diſeaſe, no ſuch thing is required; the legal reconvaleſcence is only to be ſo far free from

from the influence of the diſtemper, that a man may follow his ordinary affairs: ſuch as going a journey, or to kirk or market, where multitudes meet, and buſineſs is done. If the granter can do this, without failing in the attempt, or being defeated by it, he is deemed out of the caſe of deathbed; which is Lord *Stair*'s opinion, who treats this very queſtion, in the deciſion 26th *February* 1669, *Pargellies*; where the Lords aſſoilzied from from the reduction, notwithſtanding there was a proof of the continuancé of the ſickneſs, in regard the defunct went to the market unſupported; which holds with greater force here, as the granter came to the Croſs without any particular view to validate the deed. Nor is it to the purpoſe, the diſeaſe was then upon him; ſeeing its effects were ſuſpended, ſo as they did not hinder him from going about his buſineſs: were it otherways, this abſurdity would follow, That perſons ſubject to the gout and gravel, and who often go abroad with ſuch ailments upon them, would be conſidered as on deathbed.

To the *ſecond* it was *anſwered:* In fact, the market-croſs ſtands in the market-place, altho' the Magiſtrates have appointed, for the conveniency of the lieges, other places for ſelling commodities; at the ſame time, the area round it is the only place where herbs and fiſh are ſold, and where the merchants keep their Exchange. *Laſtly*, As to the obſervation, That it does not appear the Earl was there upon a market-day, it is ſufficient to obſerve, That, from ſome circumſtances of the proof, it is probable it was not on a *Sunday*; and the reſt of the week, there is a fiſh-market and daily Exchange held about the Croſs.

The Lords repelled the reaſon of reduction.

N° XXXVI. *November* 25. 1736.

John Weir contra *John Parkhill.*

A Donation cannot be conſtitute by a Writing in the Form of a Bill.

Mary Weir, relict of *Malcolm M'Gibbon*, having ſucceeded to his effects, did, in the year 1723, marry *John Parkhill*; and, in their contract of marriage, ſhe diſponed to him all her goods and gear, whether heritable or moveable, pertaining to her, or that ſhe might ſucceed to any manner of way. This marriage diſſolved, by *Mary Weir*'s death, in the year 1734; after which, her brother, the ſaid *John Wier*, intended an action againſt *John Parkhill* for payment of a bill, granted by his ſiſter to him, before her marriage with the defender, of the following tenor or contents: "*Edinburgh*, *March* 14. 1723, Dear Siſter, pay to "me, or my order, at my dwelling-houſe in *Edinburgh*, eighteen months "after date, the ſum of ſeven thouſand pounds *Scots* money value, due "by you to me, as your deceas'd huſband ordered you; make thankful "payment, and oblige your humble ſervant." (Signed) *John Weir*, and addreſſed to, and accepted by, the ſaid *Mary Weir*.

Againſt this writing, it was *objected:* That the ſame was void, for want of writer's name and witneſſes; it being no bill *in re mercatoria*, but a plain gratuitous obligation, as appeared from the words of it: neither did

did it prove its date; and ſo, if a true writing, might have been granted after the defender's marriage, in which caſe he could not be liable. In ſupport whereof, it was obſerved, That the extraordinary privilege granted to bills, of their being probative without the legal ſolemnities, ariſes only from their utility in commerce; but where they are not *in re mercatoria*, as in this caſe, there is no reaſon for ſuſtaining or giving them any ſuch privilege. On the contrary, they ought to be diſcouraged, as dangerous to property, by opening a door to manifeſt frauds. Another reaſon for allowing extraordinary privileges to bills in mercantile affairs, is, That, by their nature, they are not to lie over, but to be ſpeedily negotiated; and ſo, if falſe, may be eaſily ſubject to challenge: but, if it be allowed to take a bill in place of a bond, where there is no mercantile dealing, and for no conſideration in money; there is an end of our law, which has introduced the ſolemnities of writings as neceſſary for the ſecurity of the ſubject. Agreeable to theſe principles, it was found, That a bill was not a legal method of conſtituting a debt or legacy, in ſo far as it was gratuitous, 13th *February* 1721, *Hutton:* which is extremely ſimilar to the preſent queſtion; ſeeing, by the tenor of this obligation, it is no other than the acceptance of the burden of a legacy. Now, no reaſon can be given why a bill for a legacy ſhould be void, for want of the ſolemnities, and that one undertaking the burden of a legacy ſhould ſtand good. In ſhort, the very nature of a bill, is to be for value; and, if it bear to be ſo, that may be ſufficient to ſuſtain it, becauſe the preſumption is on the ſide of the writ; yet, if *in græmio* it bear not to be for value, but for a gratuitous cauſe, there it ought to have no privileges; if it were otherways, all contracts might be turned into bills. Conform to this reaſoning, it has likeways been found, That a bill, granted in the way of donation, *mortis cauſa*, was void, 9th *November* 1722, *Fulton*; where it was admitted, That, if it had expreſſed the cauſe thereof, ſo as to point out that the ſame was a gratuity, it would have been void: now, in the preſent caſe, this writing is *felo de ſe*; it is not an abſolute draught, not ſo much as in the form of a bill for value, but bears its cauſe to have been a verbal legacy, which, it is pretended, the accepter's huſband left to the drawer, and which ſhe could not have been obliged to pay. It is upon the ſame foundation, that bills, bearing annualrent and penalty, are void; ſuch ſtipulations not being ſuitable to the nature of the obligation.

As to the laſt part of the objection, it was obſerved, That, if ſuch obligations were to prove their dates, no huſband could ever be ſecure againſt the deeds of his wife; it being ſo eaſy to antedate them, eſpecially for gratuitous cauſes: nay, every reaſon that makes holograph writs not prove their dates againſt an heir, conccurs in ſupport of this part of the objection.

Anſwered for the purſuer: There is no foundation in law for maintaining, That a bill, given by way of pure donation, will not be valid: May not a man, who intends to make a preſent of a hundred pounds, accept a bill for the payment of it? ſurely that will be as obligatory upon him, as if it were for value: the purſuer is at a loſs to find out a reaſon for doubting; ſeeing, if a man, who was not debtor *ab ante*, can gratuitouſly make himſelf ſo by a bond; it is inconceivable why he ſhould not be able to accept a bill for that ſum. The law gives force to all inland-bills or precepts in general, without diſtinguiſhing whether for value or not; and therefore the preſent one, tho' it were gratuitous, is ſecure againſt

gainſt this objection: at the ſame time, it is not altogether ſo, being granted in implement of her huſband's requeſt, to whoſe effects ſhe ſucceeded; had ſhe paid the money, it could not have been repeated *condictione indebiti*; conſequently, it is evident, the bill was binding on her; and, of courſe, muſt affect her huſband, who cannot pretend to take her eſtate, without the burden of her debts. It is true, that, where the form of the obligation has deborded from the common nature of bills, and parties have ſought, under the colour thereof, to create a different contract, the Court has juſtly diſregarded ſuch writings; but, when there is a drawer and accepter, and a fixt term of payment of a certain ſum, which properly conſtitutes a bill, it has never yet been found, that ſuch writing is not intitled to the uſual privileges. Indeed, a bill to pay a ſum of money, after the accepter's death, accepted in truſt, that, if the party did not then die, it was to be given up; and, if he did die, the ſame ſhould ſtand as a legacy, was declared void in the caſe between *Fulton* and *Clark*; becauſe obviouſly this tranſaction was the making a will, and not the acceptance of an order to pay a ſum of money: as this was the fact, it amounted to no more than a legacy or *mortis cauſa donatio*; and therefore the Court, very juſtly, would not ſupport the writing: but here the draught is pure and ſimple, having no quality or condition to difference it from the common ſtyle and nature of bills; wherefore it muſt ſtand as long as the act 1696. An obligation likeways to pay a ſum of money with annualrent and penalty, is clearly a permanent ſecurity for money intended not to be paid, but to lie at intereſt; and therefore is directly oppoſite to the form and nature of a bill: ſo that, tho' it may be conceived in appearance by way of draught and acceptance to intitle it to the privilege of one, yet, in reality, it is not a bill; and the ſuſtaining it as ſuch, would encourage conceiving permanent ſecurities in that form, which might be attended with great danger. With reſpect to the hazard to which the lieges would be expoſed if ſuch deeds were ſuſtained, from the impoſſibility of diſproving their dates, it was acknowledged, they were undoubtedly liable to many abuſes: but that was nothing to the purpoſe; ſeeing the ſtatute has ſaid, That they ſhould be valid; and therefore, ſo long as it remains in force, ſuch conſiderations can have no weight.

The Lords found, That a donation could not be conſtitute by a writing in form of a bill; and that there was no onerous cauſe for the writing produced.

N° XXXVII. *November* 26. 1736.

Archibald Campbell, Merchant in *Edinburgh,* contra *Gilbert Ramſay* Bailie in *Kelſo.*

Does the Penalties in the Act 1701, *reach other Caſes than thoſe which are therein particularly enumerate?*

THE ſaid *Archibald Campbell* ſet out from *Edinburgh* to *London*, alongſt with Mr. *Joſeph M'Kenzie*; but, when they came to *Kelſo*, an in-

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formation, ſigned by Quarter-Maſter *Stewart*, *&c.* was given in to Mr. *Ramſay* as Bailie of that place, ſetting forth, That *Campbell* had clandeſtinely carried away *Mackenzie* from his wife and family; and that he had likeways prevailed upon him to carry off ſeveral writs and evidents of his eſtate; therefore, praying a warrant to detain *Campbell* until he ſhould find bail not to carry *Mackenzie* away with him, and to anſwer to a competent court for what he had already done.

In conſequence of this information, the Bailie granted a warrant; in virtue whereof, *Campbell* was incarcerate; but, upon finding bail, he was liberate. After which, he brought an action againſt *Ramſay* for wrongous impriſonment; wherein the Lords found his proceedings illegal and oppreſſive; *Campbell* then inſiſted for the penalties in the act 1701.

Pled for the Bailie: That this caſe does not fall within the ſtatute; ſeeing wrongous impriſonment, in the ſenſe of that law, is no other but impriſonment without a warrant expreſſing the cauſe for which the party is committed, or the refuſing to admit to bail in caſes not capital, or the undue delaying of trials, as is more particularly mentioned in the act, which is likeways evident from the preamble; whereby it appears the legiſlature had nothing in view, but to correct abuſes in the form of commitments, or in the ſetting at liberty.

Anſwered for the purſuer: There is no doubt the ſtatute intended to give a remedy to certain particular abuſes; ſuch as committing a perſon without any warrant of commitment, *&c.*: but, tho' the law expreſsly guards againſt theſe particulars, yet the general ſcope thereof is, to protect the liberty of the ſubject, by reſtraining all manner of undue or unwarrantable commitments; and, it being impoſſible to enumerate particularly every caſe againſt which a remedy is intended, therefore it ſubjoins a general clauſe, "extending the pains to all caſes of confinement, not "either conſented to by the party, or inflicted after trial by ſentence;" whereby every impriſonment not authoriſed by law is comprehended. And, as the preſent caſe falls not within any of the exceptions ſpecified in the ſtatute; ſo, of conſequence, the pains thereof muſt reach it, as the ſame has been found to have been illegal and oppreſſive.

The defender *replied*: The words of the clauſe referred to, *ſhall be extended to all confinements*, imports no more, but that all the proviſos, *&c.* ſhall take place in every confinement, tho' it was to one's own chamber; and the exception ſubjoined thereto, points out that the clauſe refers to commitment without a warrant expreſſing the reaſons thereof, and to no other delinquency; becauſe, in theſe excepted caſes, where either the party conſents, or impriſonment is inflicted by ſentence after trial, there is no need of a ſigned information, containing the reaſons of impriſonment; therefore it cannot be conſtrued to extend the ſtatute to caſes which are not contained therein, or to the penalties of the law where there is no contravention.

The Lords found, That this caſe did not fall under the act of parliament anent wrongous impriſonment.

N° XXXVIII.

N° XXXVIII. *December* 1. 1736.

John Hepburn of *Humbie*, contra *James Hepburn* younger of *Humbie*, his Son.

1. *Summar Application.* 2. *Eſquire, is it a good Deſignation?* 3. *Homologation.*

THE ſaid *James Hepburn*, as heir to the entailed eſtate of *Humbie*, intented a proceſs againſt his father for an aliment: during the dependence whereof, he offered, That, in caſe the defender would make over to him, during their joint lives, the growing woods upon the eſtate, he would find ſecurity to pay him a certain ſum yearly, and content himſelf with the ſuperplus profit in lieu of any other demand. *Humbie* accepted the offer, and the Court interpoſed their authority to the agreement: however, ſome differences having ariſen thereafter betwixt them, they ſubmitted the ſame to an arbiter, who pronounced a decreet-arbitral pretty much on the ſame plan with the decreet of the Court of Seſſion, and which, *inter alia*, contained the following clauſe: "That, if two "terms payment of the money ſhould run unpaid, then the ſon was to "loſe his right to the whole woods, *ipſo facto*, without need of any de-"clarator." In virtue whereof, the ſon obtained poſſeſſion; and, having run two terms in arrear, *Humbie* elder applied by petition to the Lords, craving, That the wood already cut might be ſequeſtrated; which being remit to an Ordinary, the ſon objected, That it was altogether irregular to ſeek implement by way of ſummary petition; ſeeing every claimant in the Court muſt follow out ſome known method of proceſs, ſuch as charging on the decreet-arbitral, or raiſing a declarator; but ſurely a ſequeſtration could not be awarded, it being contrary to the rules of law to ſtrip any perſon of his right upon a bare allegation in a ſummary petition. 2*do*, The decreet-arbitral is void, one of the witneſſes to the ſubmiſſion being only deſigned Eſquire, which, by the law of *Scotland*, is no deſignation.

Anſwered for *Humbie* elder: That, as the irritancy was incurred, it was competent for him to apply for a ſequeſtration, the ſubject being periſhable by imbezzlement, *&c.*; more eſpecially, as the decreet-arbitral expreſsly provides, That the ſon ſhall loſe his right, in caſe of an irritancy without declarator. A clauſe that would be effectual in the caſe of a tack or contract; tho' perhaps a right of fee to lands could not be irritated without a declarator: but, *ex ſuper abundanti*, he has likeways execute one, which he herewith repeats. And, as to the objection touching the deſignation, it is believed, the ſame can infer no nullity: but, to ſuperſede the neceſſity of determining that point, it is ſufficient to obſerve, That his ſon has homologate the decreet-arbitral by repeated acts; whereupon the Ordinary found, That, if the irritancy is incurred, it is competent for *Humbie* elder to apply for a ſequeſtration; and, before anſwer to the objection to the ſubmiſſion, allowed a proof of the homologation; which, when it came to be adviſed, the Lords found relevant and proven.

Againſt this interlocutor, *Humbie* younger reclaimed, inſiſting again upon the objections moved before the Ordinary; and particularly, That,

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as the ſubmiſſion was void, in reſpect of the witneſs not being duly deſigned, ſo, unleſs the proof of the homologation imported ſome acts or deeds of his (which it did not) equal to, or of the ſame force with the ſubmiſſion, it could not avail in order to eſtabliſh a compromit betwixt them; therefore the queſtion behoved to be conſidered as upon the footing of the ſubmiſſion alone, which being void, could bear no faith in judgment; and, of courſe, no decreet-arbitral could follow thereon. Indeed, where the writing is execute according to form, altho' it may be liable to ſome exceptions, the queſtion admits of a different conſideration; ſeeing, in ſuch a caſe, the party to whom the exception is competent may wave it by ſome act or deed which may be pled as an homologation thereof; but it is not ſo obvious, how a deed, abſolutely void, and which can bear no evidence in judgment, is a proper ſubject of homologation.

Humbie elder *anſwered*: That he admitted there were no acts of homologation proven, ſufficient by themſelves to make a ſubmiſſion, unleſs the writing which is called informal, is taken along; but, after the different acts that have been proved, his ſon cannot now be heard to plead that the ſubmiſſion is informal; ſeeing it does plainly appear from the evidence, that he acquieſced in the deſignation; therefore he is barred from objecting. To illuſtrate which, it was obſerved, That there were ſome ſolemnities introduced by law for univerſal utility, ſo eſſential, that it was not in the power of parties to diſpenſe with them: but, as to other formalities, which are only calculated as checks for the ſecurity of parties againſt frauds, particularly againſt forgery, ſuch being ſolely provided for the uſe of private perſons, the general law is not concerned with them, it is not *pars judicis* to take notice of them; ſeeing the private parties may inſiſt upon, or wave them at pleaſure; and of this ſort are all objections to the deſignation of witneſſes, ſuch regulations being introduced by the act 1681, for their benefit allenarly.

The Lords adhered.

N° XXXIX. *December* 3. 1736.

Robertſon contra *M'Inlay.*

Septennial Preſcription.

M'Inlay having become bound as cautioner, in a bond of preſentation, to preſent the perſon of *Archibald Hamilton* againſt a day certain; otherways to pay the debt.

The Lords found he was not intitled to the benefit of the preſcription introduced by the act 1695.

N° XL.

N° XL. *Eodem Die.*

The Creditors of *John Moonie* Merchant in *Calton*, contra *Hugh Broomfield.*

An Arreſtee may prove any Ground of Compenſation by the common Debtor's Oath, tho' bankrupt, that was liquid before the laying on the Arreſtment.

THE ſaid *Broomfield* being debtor to *Moonie*, both by bond and bill, and likeways in an open accompt, he, in payment of theſe debts, advanced money, and furniſhed goods to *Moonie*; who having turned bankrupt, arreſtments were laid by his creditors in *Broomfield*'s hands; and, in the forthcoming thereon, the debt being referred to his oath, he acknowledged that he owed to the common debtor money, by bond and bill, and likeways an open accompt to an uncertain extent; but added, That, before the arreſtments, he had made payments and furniſhings to *Moonie*, which, by an accompt ſtated betwixt them after the bankruptcy, reduced the balance to ſo much.

Whereupon the arreſters *pled:* That the oath was probative againſt the defender, in ſo far as he has owned that he owed ſo much by bond and bill, *&c.*; but, with reſpect to the quality adjected thereto, of the payments and furniſhings made by him to *Moonie*, it was extrinſic, and not competent for him to depone thereon; as it neither was, nor could be, referred to him, the reference being in common form, *ſcil.* what he was due to the common debtor at the time of the arreſtment; and, if his own oath, without ſome other inſtruction, were ſufficient to extinguiſh the bond, it would be in the power of any perſon, to whoſe oath a debt was referred, to create another by a ſimple averment to balance it.

Anſwered for the defender: That having referred the extent of the debt to his oath, and he having accordingly ſworn, That the balance was only ſo much at the time of the arreſtment, there was an end of the queſtion; ſo that he could not be liable for any more. But, 2*do*, if needful, he offers to prove the verity of the furniſhings, and money-payments by *Moonie*'s oath.

Replied for the arreſters: That, in effect, they are legal aſſigneys; and, as voluntary ones cannot be hurt by the oath of the cedent; ſo neither ought they, *e. g.* if *Moonie* had aſſigned the defender's bond, it would not have been competent for him to object articles of compenſation probable by *Moonie*'s oath: he behoved to anſwer the aſſigny, and operate payment of his counter-claim the beſt way he could.

Duplied: There is a great difference betwixt an onerous aſſigney or indorſee, and an arreſter; for the firſt purchaſes the right, not ſo much on the faith of the cedent, as becauſe he ſees no part of the bond or bill marked received on the deed itſelf; but an arreſter, who tries to affect ſubjects where he can find them, muſt take them juſt *tantum et tale* as they are, under all the burdens they belong to his debtor; therefore his oath muſt be as competent againſt the arreſters as it would be, if the queſtion

were with himſelf: neither does it make any difference that he is bankrupt, that not inferring an *infamia* of any kind.

The Lords found, That he could prove, by the common debtor's oath, any ground of compenſation that was liquid before laying on the arreſtment.

N° XLI. *December* 10. 1736.

Robert Simpſon contra *Peter Strachan.*

Is a Decreet-arbitral, ſigned, but remaining with the Arbiter or his Clerk, effectual before it is delivered to the Parties, or put into the Regiſter?

THESE parties having referred certain differences betwixt them to an Arbiter, he pronounced his decreet-arbitral therein a ſhort time before the ſubmiſſion expired: after which, *Simpſon*, having got notice what the terms of it were, alledged, That the Arbiter had forgot a material article, whereby he was greatly leſed by the decreet; therefore he begged, That the Arbiter would either review the ſame, as it was ſtill in his Clerk's hands, or not give it out, unleſs the other party would agree again to ſubmit the affair to him: but the Arbiter, judging he was *functus*, refuſed to alter; whereupon *Simpſon* inſiſted in an exhibition and reduction thereof, as being an undelivered evident, or that the Lords would find and declare the Arbiter had ſtill a power to make effectual or deſtroy the decreet.

The arguments urged for the purſuer were: That, until an Arbiter publiſh his decreet, it is in his power to make it effectual or not as he pleaſes; ſeeing it is the due publication thereof, by delivery to the parties, or putting it in the regiſter, that can render it a decree; and, of conſequence, unquarrellable by the regulations 1695. If indeed it had proceeded on a ſubmiſſion, obliging the Arbiter by his acceptance to determine, the queſtion might have been different; for then what he did would not have been a diſcretionary, but a neceſſary act; as the parties, in ſuch a caſe, would have had a right to exact a decreet, which the Arbiter could not have with-held from them, whether he was ſatisfied with it or not: but the ſubmiſſion whereon this decreet proceeded bears no ſuch clauſe: it was in the power of the Arbiter either to pronounce his decree or not; and, as this was optional to him before giving judgment, it follows, that he might legally refuſe to publiſh it after it was ſigned; more eſpecially, conſidering that, before a decreet is given out or publiſhed, it does not belong to the parties, but to the Arbiter, who may do with it as his own judgment directs, juſt as in the caſe of a bond or other deed, that one could not have been compelled to ſubſcribe; which, however, when ſubſcribed, may ſtill be rendered ineffectual by not delivery. Nor does it make any difference betwixt the two caſes, that the Arbiter may be thought, by accepting the ſubmiſſion, to be under a natural obligation to give forth his decreet; ſeeing ſuch obligation does not produce any action in law, whereby he can be compelled to do it; and conſequently he may refuſe to make it effectual when ſigned; a doctrine which likeways holds in judicial

dicial deeds, as every judge may cancel an interlocutor ſigned by himſelf before it is publiſhed.

Anſwered for the defender: Where publication is introduced by ſtatute, as in the caſes of interdictions and inhibitions, ſuch deeds are not perfect until they are publiſhed; but no law makes it neceſſary towards the completion of a private deed or contract. Indeed, delivery of a writ is ſometimes requiſite in order to make it effectual; but, if it is out of the granter's hands, the perſon, in whoſe favours it is conceived, has a right to ſue for exhibition and delivery, without neceſſity of proving it was delivered, as that is preſumed; but, where the deed is obligatory on both ſides, as in mutual contracts, ſuch writ is effectual, without delivery: the application of all which to the preſent caſe is obvious; ſeeing this decreet is, in virtue of the ſubmiſſion, a deed of mutual conſent, and, to all legal effects, the ſame as if the parties had covenanted what the Arbiter decreed; hence it follows, that it was a compleat deed from the moment it was execute, without the neceſſity of delivery, and, after that period, while it was in the Arbiter's keeping, he muſt, from the nature of the thing, be conſidered only as cuſtodior for the parties. In the *next* place, with regard to what the purſuer prays, That the Lords would declare the Arbiter has ſtill power to review or deſtroy the decreet, it is ſufficient to obſerve, That, as ſuch power is ſolely lodged with the Arbiter, the Court cannot communicate, or give to another, a right which they have not; and, if he ſcruples his own power, that is what cannot be helped; their being no clauſe in the ſubmiſſion whereby he can be compelled to proceed in any one ſtep of the arbitration. At the ſame time, the decreet is ſo well founded, that, if it were not the hazard of being involved in a law-ſuit, the defender would have no ſcruple in conſenting to open it.

The Lords repelled the reaſons of reduction.

N° XLII. *December* 14. 1736.

Thomas Paterſon Wright in *Glaſgow*, contra *John Anderſon* Wright in the *Gorballs*.

Does the Penalties in the Act 1701, *reach other Perſons than Magiſtrates or Officers of the Law.*

IN the proceſs at the purſuer's inſtance, againſt the defender, for wrongous impriſonment, a proof having been led; at adviſing thereof, "the "Lords found the purſuer was unwarrantably impriſoned, *&c.* and that a "double of the warrant of commitment was refuſed to him, altho' de-"ſired; and found it proven, that the defender was acceſſory thereto; "and find it not proven, that he had any warrant for ſo doing; which "the Lords found relevant to ſubject him to the penalties in the act of "parliament anent wrongous impriſonment; therefore, *&c.*"

The defender reclaimed, upon this ground, That any irregularity he had ignorantly fallen into, ought not to ſubject him to the penalties of the act 1701; becauſe it was intended only to reſtrain the abuſe of power in Magiſtrates or other officers of the law, who are intruſted with the power of

of committing their fellow-ſubjects to priſon, as is evident from every part of it; particularly, the clauſe anent "impriſonment in order to trial, "by a warrant in writ; the admitting perſons to bail, *&c.*" And likeways, from the additional penalty over and above the fine; "*viz.* that "perſons guilty ſhall loſe their offices." None of which things are applicable to a private perſon, ſuch as the defender, who is clothed with no authority, and who has no office to loſe: neither was there any occaſion to guard againſt incroachments on liberty committed by private perſons, as that is what rarely happens; but, when ſuch abuſes do occur, they can be ſufficiently reſtrained by the common rules of law, whereby every riotous or illegal proceeding is liable to be puniſhed.

Anſwered for the purſuer: The deſign of the act was general, to protect the liberty of the ſubject, which, when incroached upon by a Magiſtrate, is no doubt a breach of duty; but it is ſtill an higher offence, when committed by a private perſon; as he thereby aſſumes to himſelf a power which is one of the chief characteriſtics of magiſtracy: beſides the clauſe extending this act to all confinements, not either conſented to by the party, or inflicted after trial by ſentence, ſhows, that the ſtatute was not intended to be confined to officers of the law; and indeed, without that, the act would have been very imperfect, if liberty had been ſecured againſt judges, but inſecure againſt private perſons, who have no authority at all. Neither does the clauſe anent loſs of office, ſhow, that only Magiſtrates were in the view of the legiſlature, no more being thereby intended, than that the offenders ſhould loſe their office, whether it is an office of magiſtracy or any other whatſomever.

The Lords adhered.

N° XLIII. *Eodem Die.*

Sutherland of *Rearquhar*, contra Mr. *Francis Robertſon* Miniſter at *Clyne*.

Is one, who is bound with another to leave a Houſe in the ſame Condition he received it, liable, if it is burnt by the other's Fault?

Rearquhar ſet to the Mrs. of *Gees*, and the ſaid Mr. *Robertſon* her ſon in law, his lands and manſion-houſe of *Rearquhar*; the chief articles of which, ſo far as concerns the following diſpute, were: "That they "ſhould leave the manſion-houſe in as good condition as they received it; "and likeways the lands, at their removal, in as good tenantry as they "got the ſame: as alſo *Rearquhar* obliges himſelf to keep them in "peaceable poſſeſſion of the lands, *&c.* during the currency of the leaſe; "for the which cauſes, and on the other part, the ſaid Mrs. of *Gees* and Mr. "*Robertſon*, for himſelf, and as taking burden in and upon him for her, "bind and oblige them conjunctly to content and pay, *&c.*" Purſuant to this tack, the Mrs. of *Gees* entered to the poſſeſſion of the *Mains* and manſion-houſe of *Rearquhar*; which laſt being ſoon thereafter burnt down, *Rearquhar* brought an action againſt her and *Robertſon* for repairing the damage; wherein "the Lords found, upon adviſing the proof ad- "duced for both parties, That the defenders were *in culpa*, in ordering "fire

" fire to be put to a heap of rubbiſh, or crumbs of peats near to the " houſe, and ſuffering the ſame to continue burning for ſeveral days toge- " ther, immediately before, and on the day the houſe was burnt; and, " no other cauſe of burning the houſe being proven, find it muſt be " preſumed to have been occaſioned by the burning of the ſaid heap; and " therefore, *&c.*"

Robertſon reclaimed, and *pled:* That, as he reſided in his pariſh of *Clyne*, twelve miles diſtance from the houſe, and had no knowledge of, nor acceſſion to burning the ſame, he could not be liable for damages ariſing from the Mrs. of *Gees* delict. To inforce which, it was argued, 1*mo*, That, when a houſe poſſeſſed by a tenant is burnt down, he is not thereby, without further, liable to make good the heritor's damages, the general preſumption of innocence throws the *onus probandi* upon the heritor, and, if he fails, the loſs muſt lie on himſelf; a principle which is alſo eſtabliſhed by the above interlocutor. And, as a conſequence of this, it was argued, 2*do*, That, tho' a tenant is bound to keep the houſes in a habitable condition, and to leave them ſo at his removal; yet ſuch obligation will not ſubject him to the damages ariſing from fire; the import thereof being no more than *ſartum tectum ſervare*. 3*tio*, Where a tenant's houſe is burnt down by the deed of a third party, he is not bound to make good the damage, no more than if the conflagration had happened by lightning: for inſtance, a tenant is not liable for the delict of his ſervants, *noxa tenet ſuos auctores*. And, 4*to*, upon this principle, when it appears by the conception of the tack, and the ſituation of the parties, that it was not intended the tackſman ſhould poſſeſs by himſelf, but only by others; in ſuch a caſe, if the houſes ſhould happen to be burnt by the fact and deed of the poſſeſſors, they, and not he, would be liable: now, to apply theſe things to the preſent caſe, it is obvious, from the clauſe in the tack, " whereby the tenants are obliged to leave the lands at their re- " moval in as good tenandry as they received the ſame;" that it was not underſtood the tackſmen ſhould enter to the natural poſſeſſion; ſeeing, with reſpect to himſelf, it could not be, the duty of his office neceſſarily obliging him to attend his charge at twelve miles diſtance from *Rearquhar:* ſo that this leaſe was rather an aſſignation to the rents, than a proper tack of the lands; wherefore, as he would not have been liable, if any of the tenants had wilfully or careleſsly burnt their houſes, ſo he ought not to be anſwerable for the delict or *culpa* of the Mrs. of *Gees*, who, tho' joined in the tack with him, does not ſign it: and, altho' he put her in poſſeſſion of the houſe and *Mains*, it does not follow that he ought to be liable for her delicts any more than he would have been anſwerable for the *culpa* of any other tenant. It is true, that, if ſhe had allowed the houſe to go into diſrepair, he might have been liable *ex contractu*: but here the caſualty aroſe from her delict; conſequently it can affect none but herſelf.

Anſwered for the purſuer: By the tenor of the tack, it was plain, both Mr. *Robertſon* and the Mrs. of *Gees* were conjunct tackſmen of the whole lands, *&c.* and that they might have taken the ſame into their poſſeſſion, the purſuer being bound to maintain and protect them therein; nay, the clauſe obliging them to leave the lands in as good condition at their removal, *&c.* was calculated for that very purpoſe, *viz.* in caſe they ſhould turn out all the tenants; that, in ſuch an event, they became bound to bring in others as good as them in their place: but, allowing the fact to

be, that the tackſkmen were not to enter to the natural poſſeſſion, it cannot avail *Robertſon*; ſeeing, with regard to the manſion-houſe, both of them were bound to leave it in as good condition as they received it; and it is obvious, that, as he took the whole burden on him, and is the only ſigning party to the tack, ſo he was looked on as the ſole tackſman; a ſecurity without which the purſuer would not have entered into the bargain, conſidering the Mrs. of *Gees*'s circumſtances are ſo low, that it would have been improper to have relied on her; in conſequence therefore of this obligation, the defender was bound to take care that no damage, ariſing either from his own or her fault, ſhould befal the houſe, and to provide againſt every accident which might have been eaſily prevented. And here the Mrs. of *Gees* ought to be conſidered as a ſubtenant for whom *Robertſon* is anſwerable, conform to the doctrine laid down *L.* 11. *De loc. cond.* and by *Sande*, *lib.* 3. *tit.* 6. *De fin.* 9. It is in vain then for the defender to ſhelter himſelf under the brocard, *noxa tenet*, *&c.* ſince he came under the ſame obligation with her, *viz.* to prevent, to the utmoſt of his power, the ruin of the houſe: nor can his living at ſome diſtance palliate the neglect; ſeeing he ought to have inquired often about the condition of the farm, which, if he had done, the fatality that happened might have been prevented. Neither is there any foundation for diſtinguiſhing betwixt the preſent caſe, and the allowing the houſe to go into diſrepair; ſeeing what the purſuer inſiſts upon, is, That, by virtue of the defender's perſonal obligement, he became bound equally with the Mrs. of *Gees*, as for himſelf, to take care to protect the manſion-houſe from all dangers and hazards whatſomever: and, as he would have been liable in the caſe figured, becauſe of her *culpa*; for the ſame reaſon, the like judgment falls to be given in the preſent queſtion; eſpecially as he cannot pretend that he acted the part of a diligent man, in allowing the houſe which had been ſet to him, and conſequently under his care and protection, to be in ſuch imminent danger for upwards of twelve days, the time which the peat-droſs continued to burn.

The Lords found Mr. Francis Robertſon *conjunctly and ſeverally liable with the* Lady *Gees.*

N° XLIV. *December* 16. 1736.

Competition, *Margaret Greenock* with *John Greenock.*

Teinds fall to the Heir of Line, and not to the Heir of Conqueſt.

THE point controverted betwixt theſe parties, was, Whether teinds aſcend to the heir of conqueſt, or go along with the land to the heir of line?

Pled for the latter: That he ſucceeds to every thing which is not ſpecially appropriate to the heir of conqueſt, whoſe right depends allenarly upon the 88th *chap. Quoniam Atach.* by which it is provided, "That, if "there be three brethren, and the mid brother deceaſing without heirs "of his body, his eldeſt brother, firſt begotten, ſhall ſucceed to his land "and tenement, and not the after born or younger brother." And, which is ratified by the ſtatute, *Robert* III. Now, as the old law mentions only lands and tenements, nothing but what was conſidered as rights of lands at that period can belong to the heir of conqueſt; teinds therefore, which are ſolely a burden upon the fruits, do not fall under theſe ſtatutes;

ſtatutes; more eſpecially as they were not *in privato patrimonio* at the time, being then the peculiar patrimony of church-men, not tranſmiſſible by ſucceſſion or conveyance; and that nothing befals the heir of conqueſt, but what can be brought under the deſcription of theſe antient laws, is founded upon the practice of the Court; ſeeing it is from this principle it has been found, That tacks, penſions and bonds, excluding executors, fall to the heir of line.

Beſides the general point, it was *urged:* That the particular circumſtances of the caſe behoved to determine the queſtion the ſame way, in ſo far as the proprietor of the land, the ſame day that he took a precept of *clare conſtat* from the ſuperiour, whereby he and his heirs are obliged to appear at the ſuperiour's courts, and ſubjected to be judged there, for any bloodwits which may happen amongſt their tenants, did likeways obtain a diſpoſition to the teinds from the ſuperiour, who was alſo titular, by which the proprietor, his heirs, tenants and cottars, are bound to anſwer to courts, and perform other ſervices, as at length is ſpecified in the precept of *clare conſtat*, or other rights and ſecurities of the land; whereby it is plain the heirs in the diſpoſition were intended to be the ſame as the heirs in the precept; becauſe, if the parties had it in their eye, that the teinds were to devolve to another heir than he that was to ſucceed in the lands, it was very irregular, inſtead of mentioning the particular duties and ſervices to be paid and performed for the teinds, to make a general reference to the rights that were to go into other hands, and which could not at all times be readily brought out to aſcertain the ſervices demanded from the vaſſals of the teinds. Beſides, the proprietor and his heirs, with their tenants and cottars, being bound to anſwer to courts, ſhows plainly, that the heirs therein mentioned can be none other than the heir of line to whom the lands were to deſcend; ſeeing he could only have tenants and cottars liable to preſtations.

Pled for the heir of conqueſt: The diſtinction betwixt heritage and conqueſt is of equal ſtanding with the feudal law amongſt us; for, whether we had that law immediately from the *Normans* or from *England*, where it was introduced by them, it is highly preſumable that this noted diſtinction came alongſt with that law; ſeeing at this day it obtains in both countries; and, tho' it is mentioned in our old ſtatutes, this does not prove that the ſame was not the common law *ab ante*. The law of deathbed, which is acknowledged to have ariſen from cuſtom, occurs likeways in the book of *Majeſty*; and therefore the determination of ſucceſſion in conqueſt cannot be looked upon as an exception from a general rule of ſucceſſion in heritage to the heir of line; but both of them ought to be deemed different rules of ſucceſſion coeval amongſt us with the feudal law.

It is true, that our antient ſtatutes only mention lands and tenements, conqueſt and acquired; but theſe words are ſufficient to comprehend every heritable right: the law of deathbed ſays, *Nemo poteſt alienare terras ſuas*; but yet, *de praxi*, every heritable right falls under the prohibition; and therefore there can be no doubt, That, where lands and tenements are mentioned, teinds are comprehended, which, both by our law and ſtile, paſs under the denomination of *ſeparata tenementa*, the rights thereof being eſtabliſhed and carried down in the ſame manner as lands by charter and ſeiſine. Indeed, before the Reformation, they were not *in commercio*; and ſo could not be deemed to fall under the ſtatute: but thereafter,

thereafter, when they became commercial, of courſe, they behoved to be comprehended under the old law.

As to the ſpeciality ariſing from the particular circumſtances of the caſe, it was *anſwered:* The ſucceſſion ſettled by law is not to be varied and over-ruled by ſo ſlight preſumptions of the intention of the purchaſer, where with certainty it cannot be affirmed what his intentions were, touching his ſucceſſion failing iſſue of his own body, by neglecting to make any ſubſtitution to theſe, it is preſumable, he left the ſucceſſion to be governed by the rules of law: and it is of no import that the *heirs whatſoever*, mentioned in the right of the teinds, were to anſwer to courts, *&c*; ſeeing theſe could be performed by the heir of conqueſt, if he ſucceeded to the teinds, as well as by the ſucceſſor in the lands; and, if both could perform the ſervices according to the tenor of their ſeveral rights, no neceſſary conſequence can be drawn from the reference in the diſpoſition to the precept, that tending to no other purpoſe than to aſcertain the ſervices by the heir and ſucceſſors in the right to the teinds.

Replied for the heir of line: It is not to the purpoſe that teinds are called *tenementa* or *feuda*, ſince they are none of the *tenementa* denoted in the ſtatute; were it neceſſary, it could eaſily be ſhown that teinds are in no legal ſenſe *tenementa*; as a diſpoſition of lands, or of lands, and tenements, was never ſuppoſed to comprehend teinds; and, if they do not fall under a general deſcription of lands and tenements at this day, How is it poſſible to maintain it could be otherways, when they were the peculiar property of churchmen.

As to the argument drawn from the extenſion of the law of deathbed, it does not apply; becauſe that law is extremely uſeful to the nation; therefore, when the ſubjects of ſucceſſion came to multiply, the Court juſtly extended the ſame; but there is no advantage by extending the ſucceſſion of an heir of conqueſt. Beſides, if the argument proves any thing, it proves too much; for, according to that reaſoning, tacks or bonds, (ſecluding executors) which have been adjudged to the heir of line, ought to go to the heir of conqueſt; ſince the law of deathbed militates againſt conveyances of theſe *in lecto*.

The Lords found that the ſucceſſion to the teinds devolved upon the heir of line, and not the heir of conqueſt.

N° XLV. *December* 17. 1736.

The Earl of *Sutherland*, contra *Rebecca*, &c. *Dunbars*.

Subſtituting a New Sheet upon a Summons in place of an old one, without Authority, makes the Inſtance periſh.

IN the proceſs of wakening and transference of an action of declarator of recognition at the Earl's inſtance, againſt *Dunbar* of *Thundertown* and others, it was *objected:* That the principal ſummons could not be the foundation of any judicial proceeding; becauſe, inſtead of the firſt ſheet, which contained a deſcription and enumeration of the lands ſaid to have

have recognoſced, and on which the calling and *a partibus* ought to have been marked; there was battered on in place thereof, without any authority, a new ſheet, containing a new enumeration of the lands which were, or at leaſt might have been different from the former, and bearing no calling marked upon it.

Anſwered for the Earl: The proceſs of recognition having depended for ſeveral years, the firſt ſheet of the ſummons by uſe was ſo torn, that it became neceſſary to ſubſtitute a new one in the place thereof, a practice no ways illegal; ſeeing, by the 31ſt act of ſederunt, allowance is given to the purſuer to amend his libel under the limitations therein mentioned; therefore, inſerting a ſheet, or amending what may be a-miſs, can be no fault, unleſs ſome damage, ariſing from ſuch alteration, could be condeſcended on: for, even ſuppoſing other lands different from the former were enumerated in the adjected ſheet, ſtill that is what the purſuer apprehends he had a power to do before extracting the act. *2dly*, It is of no importance that the *partibus* is cancelled; ſeeing it is a minute of the feebleſt kind, a mere form of no advantage to either party; all ſummonſes being thereafter given out, ſeen, and returned: ſo that, granting the ſame had never been called in the outer-houſe, it is impoſſible to maintain ſuch an ommiſſion would have been a bar to extracting; eſpecially after ſeveral interlocutors had been pronounced in the cauſe without moving the objection. Beſides, where there are ſeveral defenders, the *partibus* is not marked on the margin of the ſummons, but on the roll of defenders; as appears from one extant in this proceſs.

Replied for the defenders: The ſummons is not now the ſame that was originally given out to them, and which they were obliged to anſwer to: it is true, if any accident deface a libel, upon application to the court, it may be mended; but, if a purſuer ſhall wilfully, at his own hand, deſtroy any material part thereof, the inſtance muſt fall, juſt as much as if he had thrown it in the fire: to confirm this, the deciſion 5th *December* 1609, *Irvine*, was quotted. With reſpect to the act of ſederunt, it was anſwered, That the manufacture in queſtion does not come under the deſcription of the amendments allowed by it, and even theſe muſt be done conform to the manner preſcribed by the act; ſo that an alteration in any other form is not valid. Anſwered to the *ſecond*, That it was indiſpenſibly neceſſary to call the cauſe in the outer-houſe, in order to the out-giving, if any procurator for the defender appeared; conſequently, it was neceſſary to make a minute of that ſtep, to the end the extracter may with legal certainty affirm, That ſuch proceedings were truely had; therefore, if no ſuch minute appears, the defect muſt be fatal to the proceſs: nor does it mend the matter, that the procurators for the purſuer and defenders appear marked on the roll of the defender's names; ſince perpetual cuſtom has made it neceſſary to enter that minute on the margin of the ſummons, and the delivering over a roll of the defender's names to the procurator who takes out the proceſs, is for no other end, than that he may know what lawyers are intitled to ſee it in his hands.

The Lords ſuſtained the objection, and found no proceſs, and that the inſtance has fallen or periſhed.

N° XLVI. *January* 5. 1737.

James Wright, contra *John Din*.

Reprobator.

IN this proceſs, a proof having been allowed to both parties, the purſuer, in the beginning of the examination, proteſted for reprobators againſt the defender's witneſſes; after which, *Elizabeth Neilſon*, ſpouſe to *James* elder, was examined as a witneſs for the defender: againſt whom *Wright* objected, That, in *May* 1727, ſhe had been put in the Town-guard for keeping a bawdy-houſe; from whence ſhe was liberate, upon enacting herſelf to depart the city never to return, under the pain of the correction-houſe; notwithſtanding whereof, ſhe had returned and continued the infamous practice of bawdy procuring.

Anſwered for *Din*: The objection was neither competent nor relevant. As to the *firſt*, It was pled to be a rule in law, That whatever falls under reprobator is not competent, where there are *conteſtes*; it being only given where the witneſs is likely to ſtand ſingle, as in the initials of the oath, or the *cauſa ſcientiae*: thus Lord *Stair* ſays expreſsly, *p.* 717, and in ſeveral other places, That the teſtimonies of the reprobators may not be *contradicta teſtium*, where there are *conteſtes*. Now, in the preſent queſtion, another witneſs has concurred with *Elizabeth Neilſon*; neither can every objection which was not proponed before the witneſs was ſworn, be hooked in under the head of improbators, only becauſe they were proteſted for in the beginning. 2*dly*, It is not relevant; becauſe, altho' infamy is a good objection by our law, yet none are reckoned ſuch, but thoſe who are convicted *criminis infammantis*. Now, the enactment referred to is no conviction, but a tranſaction which would not infammate; ſince it was done with the intervention of the Magiſtrate. But, granting the objection were true, which is denied, ſtill it is not relevant; ſeeing it is not of the ſame kind with falſe ſwearing: for a woman may be ſuppoſed lewd, or a promoter thereof in others, and yet ſcruple at ſwearing a falſe oath.

The Lords repelled the objection, in reſpect no particular reprobator was proteſted for, but only reprobator againſt the witneſſes in general.

N° XLVII. *January* 13. 1737.

James Moffat, contra *John Moffat*.

Quality adjected to an Oath, whether extrinſic or intrinſic?

IN the proceſs at the purſuer's inſtance, for payment of *L.* 65 *Scots*, as the agreed price of a ſcore ews and lambs, ſold by him to the defender, about ſixteen years ago: the libel being referred to oath, the defender acknowledged, " That he bargained and agreed with the purſuer about " the

" the ſcore ews and lambs libelled; and *John Moffat* in *Adding ſton*, the " purſuer's good-brother, went along with the deponent to the hill, and " ſhowed him the ſheep; and the deponent agreed with the purſuer for " the ſaid ſoum of ews and lambs at the price libelled. Depones, That, " ſometime after the bargain, the purſuer ordered the deponent to pay " the price of the ſaid ews and lambs to the ſaid *John Moffat* in *Adding-* " *ſton*, which accordingly he did."

From this oath, the following queſtion aroſe: Whether or not the quality adjected thereto, was extrinſic or intrinſic? The purſuer contended, That the quality was extrinſic, and no otherways probable than by his own oath or write, which was evident from the following conſiderations: 1*mo*, That payment taken in general was not an intrinſic quality; ſeeing it aroſe from the nature of the libel and reference, and that a purſuer was under no neceſſity to alleadge more in a libel than that the debt was contracted; that it is not paid, is a negative which proves itſelf. Indeed, where the purſuer refers to oath, reſting owing, either voluntarily, or being circumſcribed by law to that kind of proof, there the debtor deponing he paid, or that nothing is reſting owing, it is the very point referred to oath, and no quality at all, neither intrinſic or extrinſic, properly ſpeaking.

2*do*, Whatever may be the caſe of payment, the quality in queſtion is not ſuch; for payment to a third party is no payment to the creditor, the quality is payment by order of the purſuer, which is extrinſic: 1*mo*, becauſe it was no part of the tranſaction: if indeed it had been agreed, That the price paid to that third party ſhould be good, the quality would have been intrinſic; but the oath bears, That the order was given ſometime after. 2*do*, Becauſe an order to pay a third party does not ariſe from the nature of the contract; payment to the party is ſpecific implement of the contract: But, when made to a third perſon, as for the party, is extraneous to the matter of the contract. 3*tio*, There is a diſtinction betwixt qualities *ſuper facto proprio* of the deponent, and *ſuper facto alieno*. In the firſt caſe, qualities may be admitted to be intrinſic, which would be extrinſic in the other: *e. g.* payment is *factum proprium* of the debtor, and ſo an intrinſic quality; but orders or commiſſions to a third perſon is *factum alienum*, with which the deponent will not be allowed to qualify his oath; as appears from the deciſion *Fyfe* contra *Daw*, collected by *Dirleton*, N° ci.

On the other hand, it was *contended* for the defender: That he had really paid the money as deponed upon; in evidence of which he produced a declaration from the ſaid *John Moffat*; wherein he acknowledged that he had received the price of the ews and lambs from the defender, by the purſuer's order, and that he had repaid the ſame at different times. And, as to the point in iſſue, it was obſerved, That the claim being preſcribed by the quinquennial preſcription, all that he was bound to depone on was the ſingle point, *reſting owing*; which he has done by ſwearing, That it is not reſting, payment being made to another by the purſuer's order. 2*do*, Payment, in all caſes, is reckoned intrinſic, and the conſtant courſe of deciſions have run in that ſtrain; nor can any good reaſon be given, why payment to a man's order ſhould not be reckoned intrinſic, as well as when made to himſelf? Surely the defender's oath is as much to be relied on in the one caſe as the other. 3*tio*, As this claim was conſtitute without writ, it was natural to imagine that it might be diſſolved the ſame way: or, put the caſe, That the claim had been brought within the five years,

if

if the purſuer had proven the bargain by witneſſes, no doubt the defender would have been allowed to prove the order the ſame way. Now, it appears very natural, where the purſuer proves the libel by the defender's oath, that he ſhould be allowed to prove his defence in like manner. 4*to*, It is a practice very uſual to pay debts conſtitute without writ, upon the creditor's verbal order; and the contrary doctrine would be too great a cloag on commerce, eſpecially in ſmall matters; a conſideration which ought to have great weight in determining the preſent queſtion.

The Lords found the quality intrinſic.

N° XLVIII. *Eodem Die.*

William Abray, &c. Factors in *Blackwellhall,* contra the Executors of *Andrew Roſs.*

Intereſt is due on a current Accompt for Money advanced by a Factor in Blackwellhall, *for Behoof of his Conſtituent in* Scotland.

THE deceas'd *Andrew Roſs,* who carried on a cloth manufactury at *Muſsleburgh,* entered ſeveral years ago into a correſpondence with the ſaid Meſſrs. *Abray, &c.*; in courſe whereof, he was in uſe to ſend to them his cloths and ſtuffs, which they ſold for his behoof, and tranſmitted the proceeds to him; as alſo they were in uſe to furniſh him with ſuch tools and materials as he had occaſion for in the way of his trade. During the courſe of which negotiation, he ſtitted three ſeveral accompts with them in the 1718, 1719, and 1720; in all which they ſtated intereſt on the different balances: after the laſt of which, the correſpondence went on as uſual, until the 1732, when it ended. Whereupon the factors tranſmitted to him an account of their negotiation ſince laſt clearance, with intereſt on the reſpective articles thereof from the time they were in advance, conform to the former accounts; which he having refuſed to pay, they now inſiſt, in a proceſs againſt him, for payment thereof, and which, upon his death, was transferred againſt his executors.

The arguments urged for the defenders were: That this being a current accompt, there lay no claim for intereſt; and, altho' it may be true, that, by the cuſtom among merchants, annualrent is due where the reciprocal advances are brought to a balance, and the ſame demanded, either by drawing a bill therefor, or otherways, if a refuſal enſued; yet, whilſt an accompt is current, and not brought to a ballance, whilſt there was a continued ſeries of payments *hinc inde,* and whilſt there remained a courſe of advances and re-imburſements, without noting the particular balance, or making a demand for the ſame, it was contended, in ſuch a caſe, that intereſt had no currency, even by the mercantile cuſtom; ſeeing it would be productive of many dangerous and unjuſt conſequences; more eſpecially here, where the defender was not acquainted by the purſuers what was the ſtate of the ſales; and of conſequence cannot be deemed *in mora,* for not paying a balance which was neither demanded nor liquidated: nor was it juſtifyable in the purſuers to carry on a claim for intereſt above twelve

twelve years, without making up the accompts, or demanding any intereſt, which, had they inſiſted for at any one period, might have been paid.

It is true, their ſituation as merchants is favourable, as being attended with an equity which allows them intereſt for their advances *loco damni*; but ſuch is likeways the defender's caſe, who being a dealer, it was equally inconvenient to him to pay intereſt, where it was not neceſſary: it muſt therefore be acknowledged to be very unjuſt, that he ſhould innocently, and without any fault or neglect of his, be drawn into ſuch an expence; and that the purſuers, by abſtaining to ſtate the accompt, and make a demand for the balance, ſhould raiſe to themſelves a claim for intereſt.

It is indeed pretended, That they made a demand; and, in evidence thereof, appealed to a letter from them to the defender, wherein are theſe words: "You are ſenſible there is a great deal of money owing to us "from you, and that it ſhould lie dead for ſo long a time, is a great pre- "judice to us; and therefore deſire you would remit *L.* 200 in a poſt or "two." But, from this paragraph, it is plain, 1*mo*, That the purſuers did not expect intereſt for their money; on the contrary, they obſerve the ſame lies dead, which, they ſay, is a prejudice to them. 2*do*, This demand is for no more than *L.* 200; whereas the ſum, on which it is pretended intereſt was then current, is no leſs than *L.* 1200.

Neither can the practice of allowing intereſt on the advances in each year's accompt, preceeding the 1720, infer any argument for allowing it in one accompt for above twelve years together; ſeeing, at fitting theſe annual accompts, the defender might have been conſcious of the advance, which, together with the ſmallneſs of the ſum, might poſſibly induce him to paſs the article as ſtated: but, when no demand was made upon him in the regular way, nor any intimation of a balance, for the ſpace of twelve years, it would be exceeding hard, if he ſhould be liable in a claim he had no notice of.

Beſides, it is a rule in aſcertaining of intereſt, That it is not the damage the party may have ſuſtained, or to what greater profit he might have turned the money advanced, which is to be conſidered; but whether there has been any interpellation or *mora* on the part of the perſon for whom the advance was made, in the repayment thereof; *Uſurae enim, non propter lucrum petentium, ſed propter moram ſolventium, infliguntur*, *L.* 17. *ff. De Uſur.*

Anſwered for the purſuers: That, as the advances were made on the defender's account from time to time; ſo, from the nature of the thing, intereſt behoved to be due thereon; ſeeing, by the cuſtom of merchants in this and all other trading countries, annualrent is allowed amongſt them, upon advances *nomine damni*, in reſpect they can employ their money in the way of trade to much better advantage than common intereſt. And a merchant, who carries on a trade in that way, by making a correſpondent abroad, advance money on his account for purchaſe of goods, is likeways ſuppoſed, by ſuch trade, to draw more profit than the common intereſt: therefore, it were highly unjuſt, that the employer ſhould draw the whole mercantile profits; and, on the other hand, that the factor ſhould advance his money, without any advantage at all, which, as it would not be equitable, ſo it can never be ſuppoſed to be the view of merchants. Nor can any reaſon be aſſigned, why a factor abroad ſhould advance his own money upon no profit, or only upon the ſmall allowance of commiſſion-money which is given for pains, and is due from the moment the com-

miſſion is execute, without any regard to the period when re-imburſement is to be made. It is true, there may be a difference betwixt the caſe of a correſpondence between two merchants, where each of them tranſmits and ſells to the other the goods in which he deals, and the caſe of a factor's advancing money on account of a merchant or clothier, in order to purchaſe goods for his uſe; ſeeing, in the firſt caſe, where one merchant ſells to another, the profit he gets by the ſale, may make up to him the intereſt of the money with which he either purchaſed or manufactured the goods ſold, until a moderate time, at which his accompt is ſuppoſed to be payable: therefore, where there is not a long delay of payment, he may not have ſo ſtrong a demand for the intereſt of the price of the goods ſold; and there a reaſonable time may be juſtly reckoned until the accompts are fitted, or a demand made to do it, and that there is a refuſal or neglect on the buyer's part. But it is quite a different affair, where a factor is employed to purchaſe goods for the behoof of a correſpondent who employs him; ſeeing, in that caſe, he does not ſell his own goods, and ſo hath no profit thereon, but advances his money for the uſe of his employer; therefore he ought to have intereſt, otherways he hath no juſt profit for employing his money in that way. Now, ſuch was the purſuer's ſituation, as their buſineſs was to buy for the defender ſuch goods as he commiſſioned, or to pay for ſcouring and dreſſing, *&c.* his ſtuffs; whereby they were always in conſiderable advance: ſo that the only queſtion here is, Whether they ought not to have intereſt therefor, from the time of their advance, to the time of their re-imburſement, by receipt of the price of the defender's goods? 2*dly*, It is a conſtant cuſtom, That, when factors in *Blackwellhall* advance money for their correſpondents, intereſt is allowed to them for the ſame; and the practice of particular places muſt always regulate that matter. See 8th *December* 1677, *Apperon*. But there is no occaſion to reſort to ſuch arguments in the preſent queſtion; as it is plain, from the three fitted accompts produced, it was underſtood betwixt the parties, that intereſt was due for ſuch advances. As to the obſervation upon the letter, it can have no weight; ſeeing merchants juſtly reckon their money is lying dead, ſuppoſing it bear common intereſt, when they have not the opportunity of employing it upon trade. Beſides, their money might properly be ſaid to be lying dead, in ſo far as the intereſts upon the advances bore no annualrent, which otherways might have been employed: at any rate, the letter is a plain notification to the defender, that he was highly in arrears, as it imports a demand of payment.

Laſtly, As to the argument drawn from the *L.* 17, it does not concern caſes where intereſt ariſes either *ex lege*, or *ex pacto*; but applies only to the caſe where the *mora* ſoly produces the intereſt; ſeeing that is what the lawyer is there ſtating: therefore, when the intereſt ariſes *ex mora*, the quantity is not computed from the gain the claimer might have made, had he got his money; becauſe the intereſt is not *in lucrum* of him, but is ſtated according to the legal intereſt; ſeeing it ariſes from the *mora* of the debtor, which, as to the quantity, is only to be conſidered, ſuppoſe the creditor's gains would have been greater.

The Lords found intereſt due on the ſeveral advances from their dates.

N° XLIX.

N° XLIX. *January* 21. 1737.

Patrick Crawfurd of *Auchnames*, contra Sir *John Stewart* of *Allanbank*, &c.

1. *The Crop of one Year is not hypothecated for the Rent of the preceeding one, where the conventional Terms of Payment are poſtponed after the Year's Poſſeſſion.* 2. *An Offer of ſufficient Security or Conſignation of Bank-notes, in a Sheriff-depute or Clerk's Hands, anſwers the Hypotheque* currente termino.

SIR *John Stewart*, *&c.* having taken a leaſe of the eſtate of *Lanton* from the Lords of Seſſion, ſubſet the ſame to Sir *Alexander Cockburn* and his ſon, for payment of 30,000 merks of yearly tack-duty, payable at *Candlemaſs* and *Lammaſs* 1732, for crop 1731; and ſo on, during the currency of the ſub-tack, which commenced at *Martinmas* 1730.

On the 9th *October* 1736, Mr. *Crawfurd* being creditor to Sir *Alexander* in the ſum of 1600 *Sterling*, ſent a meſſenger to poind crop 1736, belonging to him; but, before proceeding to execute the diligence, a bond was offered to Bailie *Cockburn*, doer for the tackſmen, ſubſcribed by Mr. *Crawfurd* and other two ſufficient cautioners; wherein they oblige themſelves to pay the current year's rent, or any other ſum that ſhould be found due for the hypotheque of that crop; and, in further ſecurity thereof, an offer was made to conſign bank-notes, to the extent of the tack-duty, in the hands of the Sheriff-depute or his Clerk.

But the tackſmen, having intelligence that ſuch poinding was to be attempted, wrote a letter to the Bailie, requiring him to oppoſe and reſiſt all attempts to poind Sir *Alexander*'s effects, until the obligations preſtable by him to them were fulfilled; in virtue whereof, ſo ſoon as the meſſenger proceeded to poind, the Bailie ſtopt him, and produced the above letter as his warrant for ſo doing: whereupon Mr. *Crawfurd* brought a proceſs againſt the tackſmen, concluding, That they ſhould be liable in payment of the debt due by Sir *Alexander* to him, as having ſtopt his poinding.

The defence was: That the tackſmen were authoriſed, as maſters of the ground, and in right of the hypotheque competent to them, for the year's rent, crop 1735, to ſtop the ſaid diligence; ſince the purſuer had not offered to make payment of the tack-duty, the terms of payment, which were *Candlemaſs* and *Lammaſs* 1736, being then elapſed; over and above which terms, the defenders had three months ſpace to make their rent effectual, conform to the deciſion in *January* 1726, *Hepburn*.

Anſwered for the purſuer: That a maſter cannot have a right of hypotheque for more than one year at a time: hence it follows, That it can only ſubſiſt for the current crop, and not for the rent at the conventional terms, where theſe are poſtponed after the year's poſſeſſion: were it otherways, that a maſter and tenant had it in their power to continue the hypotheque for years and terms thereafter, many inconveniencies to commerce might enſue. And, as to the deciſion in Mr. *Hepburn*'s caſe, it does not apply; becauſe the hypotheque that he inſiſted for, was on account of the year's poſſeſſion, which ended at the *Whitſunday*, when the rent became

became payable: in which caſe, the Lords found, That he had a right of hypotheque three months immediately after the current year was out. But here there is not the ſame reaſon for giving a quarter of a year of grace, after the conventional terms, conſidering how long they are poſtponed after the year's poſſeſſion was at an end. If indeed the terms of this ſubtack had been, That the rent, for crop 1735, was payable at *Martinmas* 1735, when the year's poſſeſſion ended, the defenders, no doubt, in terms of that deciſion, would have had an hypotheque current for crop 1735, until *Candlemas* 1736; but, when the rents of Sir *Alexander*'s poſſeſſion, ending at *Martinmas* 1735, are not payable till *Candlemas* and *Lammaſs* thereafter, it would be attended with ſeveral bad conſequences to creditors, if it were found, That a maſter and tenant had a power to prorogate the hypotheque for three quarters of a year; and, when that is done, the Judge ſhould ſtill continue the ſame for three months longer, whereby this privilege, which is limited to one year, would in reality become a hypotheque for two.

But, in the *next* place, granting this diligence could have been ſtopt for three months after the term of *Lammaſs*, on account of the hypotheque, it is certain, That, if as much as would have been ſufficient to pay the year's rent had been left on the ground, they could not lawfully oppoſe the poinding, ſeeing both the conventional terms were then paſt; conſequently, their reſiſting the firſt ſtep of diligence, before it could appear whether a ſufficiency would be left or not, was unwarrantable, and, of courſe, muſt ſubject them to the payment of the purſuer's debt.

The tackſmen replied: That the hypotheque competent to heritors, does not expire by the lapſe of the year, or the crop for which the rent is payable, but continues in its full extent, until the terms of payment of the rent, as has been often adjudged, 29th *March* 1639, *Hay*; 29th *June* 1642, *Polwort*: Lord *Stair* likeways, book i. *tit.* 13. and 15. lays down the ſame doctrine, "That the heritor has action againſt all intromitters, "unleſs they prove that there was ſufficiency of goods upon the ground "at the term of payment." And indeed, if the hypotheque ſhould be ſuppoſed to expire at the legal terms of *Whitſunday* and *Martinmaſs*, tho' before the conventional terms of payment of the rent, it would be but a name, giving in moſt caſes no real ſecurity to the heritors; ſeeing, generally ſpeaking, rents are made payable long after the legal terms. But it would ſeem unneceſſary to inſiſt on this point, as it was ſo lately determined in Mr. *Hepburn*'s caſe, That the hypotheque did not expire until three months after the term of payment of the rent.

If therefore the defender's hypotheque, for crop 1735, was ſtill ſubſiſting on the 9th *October* 1736, it follows, That, unleſs actual payment of that year's rent had been tendered to them, they cannot be liable in this action; neither is there any thing in this doctrine that appears contrary to the principles of law, or hurtful to commerce; as the hypotheque, for the ſucceeding year, does not commence until the expiration of the hypotheque for the preceeding one; and, when that ends, the ſame goods that were hypothecate for that year, become, of courſe, liable for the ſucceeding one.

But, granting it expired at *Martinmaſs* 1735, and that, at the date of this attempt to poind, the defenders had only an hypotheque for their rent 1736; yet, even upon that ſuppoſition, they are at a loſs to diſcover upon what ground in law they can be liable; ſeeing no creditor is bound to

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part with a real ſecurity upon offer of caution or conſignation; without actual payment; which more eſpecially muſt hold in the preſent queſtion, as the bond of caution offered is expreſsly qualified with the condition, That the tackſmen aſſigned their right of hypotheque to the purſuer, which they were not bound to comply with; for all that could have been demanded of them, was, to aſſign the rents, upon condition that they were paid by Mr. *Crawfurd*, when theſe became due: but, without conveying the hypotheque, which might have excluded themſelves from poinding for the arrears of former years. Neither can the offer to conſign the bank-notes in the Sheriff-depute's hands influence the queſtion; becauſe no body is obliged to take theſe in payment: and, at any rate, ſuch conſignation cannot be deemed equivalent to payment; as no action was competent at their inſtance, againſt the Sheriff or his Clerk, to make the ſame forthcoming.

The Lords found the crop 1736 *was not hypothecate for the rent* 1735, *and ſuſtained the ſecurity or conſignation offered as ſufficient.*

N° L.

Steelbow.

THEIR was another defence inſiſted on for the tackſmen, *viz.* That, together with the ſub-tack, they delivered to Sir *Alexander* the whole oxen, horſes, *&c.* on the eſtate, in the way of ſteelbow; under condition, that, if two terms ſhould run in the third unpaid, he ſhould forthwith cede the poſſeſſion of the tack and goods, without any proceſs of law, ſo as they might enter to the ſame: notwithſtanding whereof, he had incurred the irritancy, and, in conſequence of which, they had ſo far reſumed the poſſeſſion, as to contract with ſome Officers for paſturing ſeveral troops of Dragoons; of courſe, theſe goods could not be poinded for Sir *Alexander*'s debts.

To inforce this, it was *urged:* That a maſter might ſet a flock of ſheep to a tenant for one or more years, ſo as he ſhall reap the advantage thereof for payment of a certain ſum of money yearly, under condition that the ſame be reſtored at the iſſue of the tack: nay, it is an ordinary practice, particularly in *Caithneſs*, to ſet, alongſt with the farm, a parcel of cattle for payment of a yearly rent, the tenant reaping the profits ariſing therefrom during the leaſe, and returning them when the tack expires. But, in neither of theſe caſes, it is believed, a creditor of the tenant's could poind the ſame, notwithſtanding his poſſeſſion; ſince it is not poſſeſſion alone which creditors ſhould truſt to, it being their duty likeways to inquire upon what terms the tenant is in poſſeſſion; which is plain from this, That goods ſent to a tenant to graſs, cannot be poinded for his debts, on account of their being in his poſſeſſion.

It is true, the caſe of ſteelbow may be attended with ſome inconveniencies; but they are none other or greater, than the maſter's hypotheque is liable to, which, however, takes place with us, without ſtatute, in prejudice of creditors. If indeed part of ſuch a ſtocking is ſold off *bona fide*, a purchaſer may be ſafe. But this no ways impugns the doctrine now pled for; becauſe, if the ſubjects are ſtill extant, the maſter, when he

ſees incumbrances coming upon the ſame, may reſume poſſeſſion (as was done in this caſe), if not acting colluſively to protect the tenant's goods.

Anſwered for the purſuer: That the rights themſelves produced for the tackſmen, plainly ſhowed the ſteelbow was no other than a ſcreen to protect Sir *Alexander*'s moveables; for, when they entered into the tack of the eſtate, *anno* 1710, they ſoon thereafter ſubſet the ſame to him, diſponing, at the ſame time, the whole ſtocking to be enjoyed by him as his own property for ever; which, beyond all queſtion, ſhows, that the moveables then upon the ground became the ſubtenant's property: nevertheleſs, by the ſubſet *anno* 1730, the ſtocking on the ground, belonging to Sir *Alexander*, was then ſubſet to him in ſteelbow; whereby it is evident, the whole was a contrivance to cover his effects. But, ſuppoſing ſuch a contract had been truly or really entered into, the nature thereof is no other than that the goods ſhould be replaced at the iſſue of the tack; which, tho' it imports a perſonal obligation upon the tenant, yet does not create any real right in the moveables, the property whereof, as they belong to the tenant, of courſe, may be poinded for his debt. And, to eſtabliſh a contrary doctrine, would be deſtructive of commerce; ſeeing poſſeſſion preſumes property; more eſpecially as moveables paſs from hand to hand without being liable to ſuch burdens as take place in real rights. See *Stair*, *tit. Loan.* § 4. *Spot. pract. p.* 93. And, with reſpect to the argument, That a maſter may ſet a flock of ſheep, for inſtance, to his tenant, which could not be poinded for his debt; it was anſwered, That there could be no doubt, various contracts might be entered into with a tenant; but, if he was not only to have the poſſeſſion, but likeways the profits and offſpring of the flock, ſuch a bargain could not cover theſe goods from diligence at a creditor's inſtance, *Stair*, book 3. *tit.* 2. § 7.

The Lords found, That there was no ſteelbow legally eſtabliſhed in this caſe; and therefore repelled the defence.

N° LI. *January* 28. 1737.

Patrick Robertſon, contra *Mackenzie* of *Fraſerdale*.

A Bond for an onerous Cauſe, bearing, that, in caſe it was reſting unpaid at the Creditor's Death, it ſhould belong to the Debtor's Heir, may be gratuitouſly aſſigned, altho' reſting at the Creditor's Death.

THE deceas'd Lord *Preſtonhall*, *anno* 1710, granted a bond to *Agnes Cockburn* his ſervant, bearing, That he was juſtly reſting and owing her the ſum of 1000 merks, which he obliges himſelf, his heirs, *&c.* to pay to her at *Martinmaſs* then next; after which is ſubjoined the following clauſe: " And, in caſe the ſaid *Agnes Cockburn* ſhall not call for " the ſaid principal ſum, and uplift the ſame with the annualrents thereof, " before her death, then, and in that caſe, the ſaid ſum, with the annual- " rents thereof, or what part of the ſame ſhall be reſting unpaid at the " ſaid time, is hereby declared to belong to *Alexander Mackenzie* of *Fra- " ſerdale* my ſon, with the burden of the ſaid *Agnes Cockburn* her burial

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" in ſuch way and manner as ſhe ſhall appoint before her death." *Agnes* aſſigned this bond to *Patrick Robertſon*, who, after her death, intented a proceſs againſt *Fraſerdale*, as repreſenting his father, for payment.

The defence was: That the bond being granted partly for wages, partly as a remuneration for faithful ſervices, was plainly intended as a fund of maintainance for the ſaid *Agnes Cockburn*; not that ſhe ſhould have liberty to alienate the ſame in prejudice of the defender, to whom, by the tenor thereof, it was to belong, in caſe ſhe died without uplifting the ſame. It was owned ſhe might have ſpent the money, and that her creditors, during her life, could have attached it; but, that her power and property therein died with herſelf; therefore the bond fell to be conſidered as conditional, payable to *Agnes*, ſecluding heirs or aſſignies, and, failing her uplifting it, to the defender.

2*dly*, The clauſe imports a return in favours of the granter's heir, which is more than a ſimple deſtination, ſo that a prohibition to alter gratuitouſly is implied; of conſequence, the purſuer ſhould prove the onerous cauſe of granting the aſſignation; for the narrative thereof, bearing that the aſſigney had made payment to the cedent of ſums equivalent to the bond aſſigned, is not evidence ſufficient of the onerofity; otherways, every perſon, who was under a prohibition to alienate gratuitouſly, might render ſuch limitations eluſary and ineffectual.

Anſwered: That the clauſe, upon which the defence is founded, imports no more than a ſubſtitution in favours of *Fraſerdale*; whereby the debtor was taken bound to pay the money, in caſe it remained unuplifted, which could not diſable the creditor, to whom it was payable ſimply, without any condition to diſpoſe thereof. It is true, *Agnes* preferred *Fraſerdale* to her own executors; but there is nothing in the bond, that ſhows ſhe intended to tie up her own hands. 2*dly*, The aſſignation was granted for an onerous cauſe; and the narrative thereof preſumes the fact to be ſo, the cedent and aſſigney not being conjunct perſons: but, whether onerous or not, is no way material; ſeeing ſhe could have gratuitouſly altered the ſubſtitution.

The Lords found, That the bond being for an onerous cauſe, Agnes Cockburn *could aſſign it gratuitouſly.*

N° LII. *February* 11. 1737.

Procurator-Fiſcal of the Commiſſary Court of *Kelſo*, contra *William Chatto* Sadler there.

Can a Commiſſar-Fiſcal proſecute a verbal Injury, tho' the Parties injured diſclaim?

William Chatto having uttered ſome ſcurrilous expreſſions, ſuch as thief, whore, *&c.* againſt *James Barie* and his wife; they, with concourſe of the ſaid Procurator-Fiſcal, brought a proceſs againſt him therefore before the Commiſſar of *Kelſo*; who, upon the fact's being proved, decerned the defender to make an acknowledgment of his fault before the congregation, as the form is in ſuch caſes; and likeways to make payment of

of *L.* 50 *Scots*, the one half to the party injured, the other to the Fiſcal, for the uſe of the poor; who having charged for the *L.* 25 *Scots* payable to himſelf, *Chatto* ſuſpended the ſame, upon the following grounds.

Firſt, Becauſe the decreet was in abſence, the ſuſpender having been in *England* during the dependance of the proceſs; and, altho' a Procurator appeared for him, who denied the libel, yet the ſame was altogether ultroneous, he having given no mandate or order to the Procurator for that effect. *2dly*, In this caſe there was no injury committed; nothing but a few idle words having dropt from him, *ex calore iracundiæ*, without any *animus injuriandi*, which, in verbal injuries, ought to be plainly proved. *3dly*, Six days after committing the offence, the private parties injured, diſclaimed all proceſs of ſcandal, either at their own or at the Fiſcal's inſtance, againſt the ſuſpender, as appears from the diſclamation now produced. *4thly*, The Fiſcal could not (after the private parties had remitted the injury), *per ſe*, inſiſt *ad vindictam publicam*; ſeeing, from the nature of his office, he had no power to proſecute private delicts, being only a Procurator appointed originally by the Biſhop to take care of confirmations and quotes of teſtaments.

To the *firſt* reaſon of ſuſpenſion, it was *anſwered:* That a regular execution was produced before the inferior court againſt *William Chatto*; after which, a Procurator appeared for him, who denied the libel; in conſequence whereof, ſeveral diets were appointed for examining the witneſſes, ſo that neither Judge nor Fiſcal haſtened matters, in order to take any undue advantage. *2dly*, The expreſſions libelled were very injurious; conſequently it was no ways material, whether they were ſpoken in a paſſion or not. And, as to the deſign of injuring, that can only appear from the expreſſions. Neither is there any neceſſity of proving the *animus injuriandi*, where the words uſed can bear no other meaning. With reſpect to the *third*, The private parties injured appeared in Court perſonally ſeveral times, ſupplicating for juſtice; ſo that, altho' the diſclamation bears date before the commencement of the proceſs, yet that can afford no reaſon of ſuſpenſion, as it was not produced nor pled upon before the inferior Judge.

4thly, Granting the diſclamation were to have its full force, or that the private parties had appeared perſonally before the Commiſſary, and judicially diſclaimed the proceſs, ſtill that could not have barred the Fiſcal from inſiſting; ſeeing, as *vindictor publicus*, he has an intereſt to proſecute crimes without the concurrence of the private party; and, as the Commiſſaries are veſted with a power of puniſhing ſcandalous expreſſions, there is no reaſon why the Fiſcal ſhould not have ſuch fines, as a perquiſite of his office; tho', in the preſent queſtion, the ſum charged for is only applicable to the uſe of the poor.

The Lords ſuſpended the letters ſimpliciter.

N° LIII.

N° LIII. *February* 18. 1737.

Dr. *Alexander Cunningham*, contra *James Livingſton.*

Import of a Deed, appointing all a Teſtator's Furniture and Moveables in a certain Houſe, &c. to belong wholly to a particular Perſon.

THE deceas'd *William Livingſton, anno* 1723, made a ſettlement of his affairs; wherein, for the love and favour he bore the Doctor, he aſſigned to him a bond of *L.* 125 *Sterling*, and ſome bank-ſtock, which comprehended all his eſtate, except the moveables he then had, under the burden of his juſt and lawful debts: and, about three weeks thereafter, he made another deed by way of codicile; wherein he appointed, " That, after " his deceaſe, all his furniture and moveables, contained in the houſe of " *Cameron*, or elſe where, ſhould wholly and ſoly become the property " of the Doctor, his heirs, and donators, with the burden of his fune- " ral expences."

William ſurvived theſe deeds ſeveral years; and, after his deceaſe, there was found, in his repoſitories in the ſaid houſe, about *L.* 30 *Sterling*, in gold, ſilver, and bank-notes, together with ſome moveable bonds due to him: all which the Doctor claimed a right to, in virtue of the above clauſe in the ſecond deed; becauſe,

1*mo*, With regard to the money, it behoved to fall under the denomination of moveables; ſeeing, both in the ſenſe of law, and in common language, every thing is moveable which is not heritable. For it is only in the view of its being a moveable ſubject, that money belongs to an executor, and, as ſuch, admitted a diviſion betwixt the wife and other executors. 2*do*, As to the moveable bonds, they ſhould likeways be decerned to be conveyed to him; ſeeing, from the whole circumſtances of the caſe, it is evident, the defunct deſigned that his whole moveables ſhould belong to the Doctor, in whatever ſtate they were at his death: for, by the firſt deed, he aſſigned to him all the particular ſubjects he then had; and, by the ſecond, he likeways diſponed to him his furniture, and all his moveables he ſhould have at his death, in order to include whatever he ſhould ſave betwixt that time and the period of his death. This being the defunct's intention, the rule of law behoved to take place here, *viz.* That moveable debts are included in a diſpoſition of all moveables, *Stair, lib.* 2. *tit.* 1. § 3. *l.* 6. *ff. De Inſt. vel Inſtrum. leg.*

Anſwered for *James Livingſton:* That the money and moveable bonds in queſtion behoved to belong to him as executor, *qua* neareſt of kin to his brother *William*, ſince they were not diſponed by the teſtator; for, as to the firſt deed, it reſpected only *jura incorporalia*, or grounds of debt, and the other only furniture and moveables in a houſe.

It is true, that theſe deeds would have comprehended every thing the teſtator was worth in the world, if he had died immediately; but, as they had no reference to what ſhould afterwards be acquired, they cannot be conſidered as an univerſal legacy, in order to include the ſubjects now claimed, which are the product of the defunct's ſaving, betwixt the date of his ſettlements, and the time of his death: therefore, it is not to the

purpoſe to plead, That money and moveable bonds are conſidered as moveable, and not heritable ſubjects; ſince there is no diſpute here betwixt the heir and executor. The only point now in hand being, with regard to the import and conſtruction of the words of a legacy, whether moveables contained in a houſe, connected with and ſubjoined to furniture, ſtanding in the ſame houſe, is the ſame as if the queſtion was betwixt the heir and executor. It is true, that ſuch ſubjects are moveable in the firſt ſenſe; and, it is only as ſuch, that the defender has a right to them; but, in this queſtion, the will of the party muſt be determined by the common acceptation of the word, attended by theſe other words, whereby it is limited or reſtrained. And, in effect, furniture and moveables are exigetic one of the other: the obvious meaning therefore is no other, than that all moveables are conveyed, ſuch as furniture; and both are limited by the following words, *contained (or ſituated) in the houſe of* Cameron, *or elſe where.*

That ſuch is the meaning of the word *moveables* in the codicile, appears from what the purſuer acknowledges, *viz.* That all the effects belonging to the defunct at that time, were made over by the firſt deed; ſo that nothing was left to be diſpoſed of by the ſecond, but his houſhold furniture; of conſequence, the defunct could not, at that time, have it in his view, that any other ſubjects were comprehended under the words, *moveables* and *furniture,* contained in the houſe of *Cameron,* and how they ſhould thereafter fall under them, is not ſo eaſy to diſcover.

A general legacy indeed of all a defunct's moveables, without referring to a place or ſituation, may comprehend lying money; (tho', when that is intended, the common clauſe of ſtile, gold and ſilver, coined and uncoined, is generally uſed); but ſtill that cannot apply to this caſe, where the word *moveables* is not only ſubjoined to furniture, but is further circumſcribed by the ſituation of a place.

As to the claim to the moveable bonds, that is equally ill-grounded; becauſe there was nothing legated by the ſecond deed, but the furniture and moveables contained in a houſe, which cannot extend to *jura incorporalia,* which have no proper ſituation, theſe being only vouchers of debt, and titles of action to recover money out of the debtor's hands; on which account, they can never be comprehended under a legacy of furniture and moveables contained in a houſe.

Replied: The will was wrote by the teſtator himſelf, who, as he was a merchant, cannot be preſumed to have known the moſt proper clauſes of ſtile; however, he has expreſſed his intention in very plain terms, *viz.* That all his moveables ſhould wholly and ſoly belong to the Doctor; and even the word *elſewhere* ſhows that his deſign was, That theſe ſhould go to him, in whatever ſituation or place they were found; therefore it is begging the queſtion to alledge, That the word *moveables,* when connected with furniture, is of no greater extent, than houſhold furniture; for furniture was mentioned as the principal thing the teſtator had in his eye, being all he then had, which was not diſponed by the firſt deed: nay, it is probable the word *moveables* was added, as being a more general term; which therefore ought not to be limited by its connection with a particular word, conform to the doctrine laid down *L.* 12. § 46. *De Inſtr. vel Inſtrum. leg.* Beſides, the defunct's burdening the purſuer with the expences of his funerals creates a preſumption, that he did not intend to except any little ready money he ſhould have by him at his death;

death; seeing that is always considered as the most proper fund for defraying such expences.

The Lords found, That the general deed, granted to Dr. Cunningham *by the defunct, does not convey the gold, money, bank-notes, and moveable bonds, lying by the defunct, and within the house of* Cameron, *at his decease.*

N° LIV. *February* 24. 1737.

John Adam Merchant in *Glasgow*, contra *Thomas Dick* Merchant in *Douglass.*

Action of Recourse.

THE said *Thomas Dick* indorsed to *John Adam* a bill, drawn by *Dick* upon, and accepted by *William Alexander* in *Dyke*, payable at *Whitsunday* 1735. On the second of *June* thereafter, *Adam* protested the bill against both drawer and accepter, at the drawer's house in *Douglass*, where it was made payable; and, upon the 8th, he charged *Alexander* with horning, who having soon thereafter faillied, *Adam*, in *December* following, brought an action against *Dick*, for recourse, before the Sheriff of *Lanerk*, where he obtained a decreet, which *Dick* suspended, upon the following reasons.

1*mo*, Because diligence was not done in due time. 2*do*, *Alexander*, the accepter, offered the charger payment at *Glasgow*, upon the 24th of *May*, nine days after the bill became due; therefore no recourse could ly, as it was the charger's fault that he had not received payment.

Answered to the *first:* That the not protesting till the 2d of *June* cannot barr recourse, unless the suspender would alledge, That the accepter had suffered an alteration in his circumstances during that time. To the *second*, The offer of payment at *Glasgow* was altogether a sham; seeing it was made when the accepter knew the bill was sent to *Douglass* to be protested, and so could not be delivered up: however, the charger offered to take the money, and find security to deliver up the bill, so soon as it came to hand.

Replied: The accepter having broke soon after the protest, the damage thence arising must fall upon the charger, who not only neglected to negotiate the bill, when it became due, but likeways omitted to notify the dishonour thereof to the suspender, until the commencement of this process. And, with regard to the alledgeance, That the charger was not in fault, anent the offer of payment, it was answered, That there is no evidence the bill was really sent to *Douglass* upon the 24th of *May:* but, supposing that to have been the fact, the charger should have got it back *quam primum*, and presented the same to the accepter for payment, whereby it would have appeared, whether the offer was simulate or real; but, instead of that, he rested satisfied with the protest, as if the accepter had been bound to attend in the town of *Douglass* ay and while a protest was taken.

Duplied

Duplied for the charger: The proteſting the bill at the drawer's houſe was the moſt formal notification that poſſibly could be given to him of the diſhonour thereof; and, altho' that was not done until ſeventeen days after the term of payment, ſtill that omiſſion cannot free the ſuſpender from being liable in recourſe, unleſs the accepter had become inſolvent in the *interim*, conform to the deciſion 25th *July* 1699, *Yule*. And, as to the offer of payment, if the ſame had been made at *Douglaſs*, where the bill was payable, poſſibly the charger, in ſuch a caſe, might have been conſidered as *in mora* for not accepting it: but, as that offer was made in *Glaſgow*, at a time when the bill neither was, nor could be preſumed to have been in the charger's hand, no regard ought to be paid thereto.

The Lords found no recourſe now competent againſt the drawer, in reſpect the bill was not duly negotiate: and therefore ſuſpended the letters.

N° LV. *Eodem Die.*

His Majeſty's Advocate, contra *Robert Rennie*.

The Act 1701 *does not extend to Trials, in the Court of Seſſion, for Forgery.*

OF this date, it is marked in the Day-book of interlocutors, That, in the complaint, at the inſtance of his Majeſty's Advocate, againſt *Robert Rennie*, for forgery, the Lords found, That the act 1701, anent perſonal liberty, does not comprehend proceſſes for forgery, before the Court of Seſſion.

N° LVI. *June* 15. 1737.

Chriſtian Stenhouſe, contra *Jean Young*, and *William Cowan* her Husband, for his Intereſt.

A Father, who is bound, by his Contract of Marriage, to provide a certain Sum to the Heirs or Bairns of that Marriage, if he gives a Sum to one of the Daughters, in her Contract of Marriage, is not preſumed to have given it as a præcipuum.

BY contract of marriage, entered into betwixt *Alexander Young* and *Janet Wilſon*, he became bound to ſecure 6000 merks, and the conqueſt during the marriage to himſelf and his wife in conjunct fee and liferent, and to the heirs or bairns of the marriage.

Of this marriage there were three daughters, *viz. Agnes*, *Jean*, and *Chriſtian*; in the youngeſt of whoſe contract with *James Stenhouſe*, *Alexander* obliged himſelf to grant, in name of portion with her, a wadſet upon a tenement belonging to him in *Libberton*'s Wynd, for 2000 merks, payable the firſt term after his own and his wife's deceaſe; which tenement, together with ſeveral other houſes, the ſaid *Alexander Young* had purchaſed during the ſubſiſtence of his own marriage, and which he had taken to himſelf and ſpouſe in conjunct fee and liferent, and to his heirs whatſoever.

Anno

Anno 1706, *Alexander Young* died without ſecuring the 6000 merks provided to his heirs or bairns of the marriage; after which, *Agnes*, the eldeſt daughter, died, and *Chriſtian*, who was married to the ſaid *James Stenhouſe*, dying likeways, her daughter, *Chriſtian Stenhouſe* having made up a title to the half of *Alexander Young* her grandfather's tenements, brought an action againſt *Jean Young* her aunt, and *William Cowan* her huſband, to account to her for the half of the rents of the houſes which they had intromitted with; in which this queſtion occurred, Whether the 2000 merks, given to *Chriſtian* by her father, in her contract of marriage, was to be deemed a *præcipuum*; or if it behoved to be deducted out of the half of the 6000 merks which the purſuer was now intitled to, by the death of *Agnes Young* her aunt?

Pled for the purſuer: That, altho' *Alexander Young* provided the ſucceſſion of 6000 merks to the heirs or bairns of the marriage, whereby they became creditors therein, each for their reſpective ſhares; yet, notwithſtanding thereof, he had a diſcretionary power to divide that ſum among them in what proportion he thought fit; which, in the preſent caſe, he had done, in ſo far as his granting a wadſet to the purſuer's mother was an expreſs declaration, ſhe ſhould have the wadſet. And, as to the other ſubjects, his taking them to himſelf and his heirs whatſomever, was an evidence ſufficient that he deſigned theſe ſhould divide equally amongſt them: ſo that here the intention of the father was as ſtrong as if he had made an expreſs ſettlement, diſponing the tenement in *Liberton*'s Wynd to *Chriſtian*, and the other houſes to her and the defender equally: in which caſe, there could have been no doubt that the father's will was, That *Chriſtian* ſhould have 4000 of the 6000 merks, and *Jean* only 2000 merks; or, which is the ſame thing, that he intended to give the ſum in the wadſet as a *præcipuum* to *Chriſtian*, and that the reſt of the ſubjects ſhould divide equally betwixt her and *Jean*; for, the taking a conveyance of houſes to himſelf, and his heirs whatſomever, was as explicite a declaration of his will, as if he had taken the conveyance to himſelf, and his heirs male, and thereafter made a ſettlement in favours of his heirs whatſoever. And, on the other hand, his granting a wadſet to *Chriſtian* was as plain an evidence of his intention, with reſpect to that tenement, as if he had taken the original conveyance from his author to her, redeemable by his heirs whatſomever, upon payment of 2000 merks.

Pled for the defender: That it was evidently contrary to the father's intention, That the 2000 merks ſhould be deemed a *præcipuum*; becauſe, at the time he provided *Chriſtian*, he had three daughters: ſo that his giving her 2000 merks was plainly intended as her proportion of the 6000 merks, to which ſhe had right by her father's contract; and the way how the purſuer comes to be intitled to the 1000 merks more, is only by the death of *Agnes* her aunt, whereby one third ſhare of the 6000 merks falls now to be divided betwixt the purſuer and defender.

As it is obvious, therefore, That the father did not deſign to give a *præcipuum* to his daughter, this queſtion, of conſequence, falls to be determined by the ſame principles, that govern collation in the children's claim of legittime; upon which footing, the purſuer muſt collate the 2000 merks that was given to her mother; as her contract of marriage bears no clauſe, That ſhe ſhould have both the 2000 merks, and her ſhare of the 4000 merks, over and above: it is therefore foreign to the point, to mention the father's power of diviſion, or whether or not he might

have given the 2000 merks as a *præcipuum*; becauſe, in fact, he did not do it: And, with reſpect to the argument drawn from the pretended diviſion, alledged to have been made by Mr. *Young*'s taking the right to himſelf, and his heirs whatſomever, it was anſwered, That it is quite imaginary to ſuppoſe a purchaſer does intend, by taking the right in that manner, to make any alteration in the proviſions covenanted to his children in his contract of marriage; ſeeing the deſign of executing the ſecurities in that way means no more than to ſecure the buyer in the ordinary form, leaving the proviſions to be made effectual, as directed by the contract of marriage, which no purchaſer chuſes the ſeller ſhould be privy to.

The Lords found, That Alexander Young *being bound, by his contract of marriage, to ſecure, in land or other ſufficient ſecurity, the ſum of* 6000 *merks to himſelf and ſpouſe, and longeſt liver, in liferent, and to the bairns of the marriage in fee; That the two daughters,* Jean *and* Chriſtian, *were, by the ſaid contract, creditors upon the ſaid* 6000 *merks; and,* 2000 *merks being ſtipulate to be ſecured to* James Stenhouſe, *huſband to the ſaid* Chriſtian, *in name of tocher, upon the tenement in* Libberton's *Wynd, found, That the ſaid* 2000 *merks ought to be imputed* pro tanto *in payment of the ſaid* Chriſtian's *ſhare of the ſaid* 6000 *merks; and that, after deducing the ſaid* 2000 *merks, there remains only* 1000 *merks due to the ſaid* Chriſtian, *and the purſuer her daughter, as her ſhare of the ſaid ſum; and found, That* Jean Young, *the other ſiſter, remains ſtill creditor to her father in the other* 3000 *merks; and that the free eſtate of* Alexander Young *muſt, in the firſt place, be applied to the payment of the ſaid reſpective ſums of* 3000 *merks, and* 1000 *merks; and that the remainder falls to the ſaids* Jean Young, *and* Chriſtian Stenhouſe, *equally betwixt them.*

N° LVII. *June* 18. 1737.

John Carruthers of *Holmains*, contra *John Johnſton* of *Persbyhall.*

Irritancy ob non ſolutum canonem.

Carruthers of *Holmains*, in the year 1669, granted a feu of the lands of *Perſbyhall* to *Chriſtopher Johnſton*, under this proviſion: "That, if "twelve terms of the feu-duty ſhould run together unpaid, in that caſe, "the diſpoſition, *&c.* ſhould thereafter be null and ineffectual, as if the "ſame had never been granted." Upon this clauſe, *Holmains* brought a reduction and improbation againſt his vaſſal, in regard the feu-duties had not been paid ſince the year 1690.

The defence for *Perſbyhall* reſolved in theſe two points: 1*mo*, That the irritancy never was incurred, in regard the vaſſal had duly offered his feu-duties to the ſuperior once every ſix years, ſince *Martinmaſs* 1690, when the laſt payment was made; for vouching of which, ſeveral inſtruments were produced. 2*do*, *Eſto* no offer had been made, yet irritancies of this kind

kind being odious, are always allowed to be purged at the bar any time before declarator.

Answered for the purſuer: That it was true there were ſeveral inſtruments produced by *Perſbyhall*, ſaid to be taken by him and his father againſt the ſuperior, at different periods, from the 1696, down to the year 1728, in order to take off the irritancy.

As to the *firſt* of which, it was obſerved: That it did not prove any offer was made by the vaſſal to the ſuperior; for all it bears, is, That the ſame was taken at *Kirkwoodgate*, without ſaying, in preſence of the ſuperior, or that an intimation was made to him, or any of his family, or the money told down, but only that the bygone feu-duties in general were offered. Now, if this inſtrument is ſet aſide, the irritancy is incurred without objecting to the others; becauſe all the reſt are taken a conſiderable time after the vaſſal had failed in payment of the twelve terms feu-duty: therefore the only remaining queſtion is, Whether or not it may be ſtill purged at the bar? And here it falls to be obſerved, That there is a material difference betwixt irritancies which depend upon the law, and thoſe that owe their origin to the convention of parties: the firſt are ordinarily allowed to be purged; but, to put the other upon the ſame footing, would be to counteract and overturn the ſettlement, which parties have thought fit to make of their own rights: and, agreeable to this diſtinction, the Lords have often determined, not only in feus, but likewiſe in tacks, and other contracts containing irritancies.

The defender *replied:* That the firſt inſtrument was made at the gate of *Kirkwood*, where it is well known the ſuperior then lived; and, it appears by the ſecond, That the firſt was intimated to him; ſo that the ſecond inſtrument ſupports the firſt. But ſuppoſing, for argument's ſake, it were not ſo formal, yet the ſmalleſt tender of payment ought to be ſufficient to prevent the effect of an irritancy; as it would be hard, that the neglect or ignorance of a Notary ſhould forfeit a vaſſal of his property; eſpecially where there is not the leaſt appearance of ingratitude to the ſuperior: on the contrary, the many inſtruments produced ſhow, that the vaſſal was not to blame for the non-payment of the feu-duty. Beſides, by a letter, dated at *Kirkwood*, 11th *May* 1722, produced in proceſs, the ſuperior writes to the defender in the following terms: "Sir, this ſhall "oblige me to diſpenſe with your not offering your feu at this term of "*Whitſunday* allenarly, I do not deſign to make any uſe of this to you, nor "no vaſſal of mine." Whereby it is plain, that he had no notion the defender had forfeited his right; ſeeing he thereby indulges him in a delay for that term.

As to the diſtinction betwixt legal and conventional irritancies, it is without any foundation; ſeeing both are purgeable any time before declarator, as Lord *Stair* lays down, *p.* 591, where, treating of this ſubject, he ſays, "The Lords have a power to modify exorbitant penalties, albeit they bear "to be liquidate of conſent of parties; and, for the ſame cauſe, they have "power to qualify theſe clauſes irritant, and to allow time for purging the "ſame." Which opinion is agreeable both to the principles of the canon law, and our practice.

The Lords ſuſtained the defence, and found the irritancy not incurred.

N° LVIII. *June* 21. 1737.

Competition, *Margaret* and *Agnes Ogilvies, &c.* with *Marion Turnbull*, Widow of Dr. *Ogilvie*.

Faculty to burden.

Robert Ogilvie of *Coul* diſponed his eſtate to Dr. *John Ogilvie* his eldeſt ſon, reſerving to himſelf a faculty to burden it with 5000 merks, in favours of whatſoever perſon he pleaſed; whereupon the Doctor was infeft; and, in conſequence of the faculty, his father thereafter granted bonds to his own children to the extent of the ſum reſerved. Poſterior to this, the Doctor intermarried with *Marion Turnbull*, whom he provided in an annuity of 800 merks; upon which ſhe was infeft; and afterwards he diſponed the lands to *John Gardener*, with *Marion*'s conſent, who conveyed them to *Thomas Ogilvie* merchant in *Dundee*, under the burden above mentioned; and he having, by a multliple-poinding, called the children of *Robert Ogilvie*, claiming the 5000 merks granted to them in virtue of the reſerved faculty, and the Doctor's widow, who craved to be preferred for her annuity upon her infeftment, a competition enſued betwixt them, wherein this queſtion occurred, Whether the 5000 merks was a real burden upon the eſtate, or if it was only perſonal?

The arguments for the children were: That, at the time *Robert Ogilvie* granted the diſpoſition to his ſon with this reſerved faculty, ſuch clauſes were generally believed to import a real burden at leaſt; ſo Lord *Stair*, *tit. Competition*, *p.* 647, ſays; his words are: "If an infeftment be "granted with the burden of a ſum, it makes the ſum a real burden; "and therefore a purchaſer proceeds upon his own hazard, if he buy "without ſight of his author's infeftment; or, if one get but right as a "creditor, that party having right to the ſum burdening, will be preferred "as an anterior real creditor, and not perſonally only."

From which paſſage it is plain, the learned author thought an infeftment, granted with the burden of a ſum, even tho' it did not mention the name of any particular creditor, made the ſame a real burden; and that the party who had right thereto would be preferred, ſeeing upon it he might adjudge: ſo that, by our law, it makes no difference, whether a particular creditor is mentioned, or if the faculty is in favours of perſons under the collective denomination of children, or if the creditors are altogether uncertain; becauſe the diſponer, in whoſe favours the faculty is conceived, being truly creditor, it may be affected for his debts, or he may diſpoſe to the extent thereof, and when the creditors do appear, they come in place of the party who reſerved the faculty: conſidering the queſtion therefore in this view, it removes all the difficulties or inconveniencies that may be alledged to follow the uncertainty attending the creditors who have right to ſuch faculty.

Neither is it eaſy to ſee how the widow's annuity can any ways compete with the children, as her liferent is conſtitute by the ſon, whoſe title was ſubjected to this burden. Beſides, the rendering ſuch faculties ineffectual, may be productive of many inconveniencies. Thus it may often happen, that, for the good of a family, a father cannot decline putting his ſon in the

the fee of his eſtate; at the ſame time, he may have other children and creditors, whoſe proviſions and debts he is willing to have ſecured, preferable to the ſon's fee; it may be inconvenient for him to determine the extent of theſe proviſions, or to divide them among his children, by immediately granting heritable bonds, whereupon they may be infeft; would it not be hard, if there was no way, in our law, to anſwer ſuch reaſonable intentions, by which no other perſon can be prejudged? And yet, it is believed, it will be difficult to point out any other method than the one that has been followed here.

On the other hand, it was *argued* for the relict: That a reſerved faculty was no more than reſerving the fee in the diſponer, in ſo far as extends to the power of charging the eſtate with the ſum mentioned in the faculty; of courſe, it can never be ſtronger than the fee itſelf. Now, no fiar can, by granting a perſonal bond, make the ſame a real burden, without a clauſe of infeftment or diligence, by adjudication.

2*do*, It is inconceivable how a debt can be a burden on a fee before it exiſts, or that the power to make it a burden ſhould make it real, where nothing is properly done to charge it upon the land. 3*tio*, It is inconſiſtent with our land-rights, that any ſums in general ſhould be a real burden upon lands, where either the extent of the ſums, or the creditor, cannot be known by any thing that appears in the right pretended to be burdened. And, as to the arguments urged for the children, it was anſwered, None of our lawyers ever held ſuch faculties to be agreeable to law. The paſſage from Lord *Stair*, if it proves any thing, tends to ſupport the contrary doctrine; becauſe it is probable, he there means a ſum having a particular creditor: and, that he had no other view, is obvious from the following words, *viz.* "That a purchaſer proceeds on his own hazard, if he buy "without ſight of his author's infeftments:" which points out that he is ſpeaking of a caſe where the purchaſer may be ſecure, if he ſees his author's infeftment: a doctrine that agrees to the queſtion, where an infeftment is burdened with a particular ſum to a particular creditor; but which does not apply, where the burden is general, either by not expreſſing the extent of the debt, or the name of the creditor.

But the diſtinction betwixt a debt contracted with a certain creditor, and a debt that hath no creditor, is ſo plainly founded on common ſenſe, that it needs no authorities to eſtabliſh it; ſeeing, where the creditor is certain the infeftment points out the burden, one knows what it is, and where it is: but, where there is no creditor, or no ſum actually contracted, but only a power to do it, there is truly no burden affecting the ſubject at the time; it is a burden may be, or may not be; ſuch as no purchaſer can know or have any ſecurity againſt. It is true, that it has been often found ſuch indefinite burdens are real; but, in a late caſe, *viz.* in the competition among the creditors of *Maclelan* of *Barclay*, the Court, upon conſidering the inconveniencies that followed therefrom, found, That ſuch clauſes did not import a real burden upon land: but, abſtracting from particular caſes, it ſeems inconſiſtent with principles, That any debt, contracted in conſequence of a faculty, ſhould be real, unleſs he that hath the faculty make it ſo, by charging it upon the eſtate; and, until that is done, it muſt remain only a perſonal burden affecting the diſponee. Neither is it ſo obvious how a debt, not contracted, perhaps, for many years after an infeftment, ſhould be a real burden thereon, ſo as to overhale immediate rights; or that a power to make a debt real does, *ipſo facto*, produce that

 effect,

effect by the contraction, more than that every fiar's debts are real, becauſe he has the power to make them ſo.

It is ſaid, That creditors may adjudge ſuch faculties; but, when they have done it, ſtill they get no more than a power to ſecure their own debts, by making them real: but this does not prove that perſonal debts, contracted in virtue of ſuch a faculty, are real, as from the date of the infeftment burdened, ſo as to exclude other creditors. Neither is there any thing in the obſervation, That the bonds, granted in virtue of the faculty, ſhould be preferable to the liferent-infeftment; as it was conſtitute by the ſon, whoſe right was ſubjected to this burden, becauſe the widow founds her plea upon this, That her infeftment is real, flowing from the fiar before the debts contracted, in conſequence of the faculty, were real; nay, that they are not ſo to this day. And, it can have no influence, That the ſon's title was burdened; *i. e.* that he was perſonally burdened, unleſs the debts, to which he was ſubjected, had been real, previous to her infeftment. *Laſtly*, as to the inconveniences alledged would follow the rendering ſuch faculties ineffectual, they are quite imaginary; becauſe, if a father has a mind to ſecure proviſions to his children, or a fund for creditors; yea even for after contractions, there are many ways to do it other than the one that has been here followed. To point out only one, Why may not the father burden the eſtate with a ſpecial ſum, payable to himſelf, or to any perſon he thinks fit; and then, of courſe, he has the power of dividing and applying it to what uſes he pleaſes? which would be conſiſtent with the principles of law, and remove every difficulty.

The Lords found, That the bonds, granted in purſuance of the faculty, were only perſonal, and not real burdens affecting the lands.

N° LIX. *Eodem Die.*

Competition, *John Garthſhore*, Merchant in *Glaſgow*, with *William Bell* of *Blackethouſe*.

An Adjudger, from one having only a perſonal Right, compleating his own Title by Infeftment, is preferable to a prior perſonal Deed flowing from the ſame Author.

William Chatto ſenior having right to a tenement in *Kelſo*, failied in his circumſtances; whereupon it was brought to a ſale by his creditors: and *Alexander Oliphant* having purchaſed the ſame, he diſponed it to *William Chatto* younger; in which diſpoſition he conveyed to him the decreet of ſale, in order to his obtaining himſelf infeft: however, neither *Oliphant* nor *Chatto* junior were ever infeft.

While young *Chatto*'s right ſtood thus incompleated, he granted an heritable bond thereon to *Bell* of *Blackethouſe*; upon which he entered to the poſſeſſion: and, ſometime thereafter, *John Garthſhore*, who was likeways creditor to young *Chatto*, adjudged the tenement from him, and, having charged the ſuperior, he obtained a charter; upon which he was infeft; whereupon a competition enſued betwixt them. And,

For

For *Blackethouſe* it was *argued:* That the right in young *Chatto* (the common author,) being merely perſonal and incompleat, he was fully denuded thereof by the firſt conveyance; of courſe, the infeftment that followed on *Garthſhore*'s title behoved to fall; as the right on which it proceeded is void. It is true, that young *Chatto* might have been infeft; ſeeing the radical right ſtill remained with him, notwithſtanding the firſt conveyance; and, if that had happened, the firſt deed would have evaniſhed in competition with a poſterior diſponee duly infeft; becauſe, in conveyances from a perſon infeft, it is not the dates of the titles, but of the infeftments (whereby he is denuded,) that is to be regarded. But, as that method was not followed, the firſt right here muſt be preferable to the ſubſequent one, notwithſtanding the radical right remained with young *Chatto*, in the ſame manner as in a queſtion betwixt aſſignies to bonds; the aſſignation firſt intimate is preferable to a prior one not intimate. Neither does this doctrine any ways tend to unhinge the ſecurities ariſing from the records, as *Garthſhore* did not contract upon the faith of them, his author not being infeft; and, any perſon who may purchaſe from him, muſt ſee, from the records, that his immediate author not being infeft, the perſonal right, that was in him, might have been qualified or alienate by a perſonal deed.

Beſides, the point now pled for ſeems well founded in the act 1617; where it is declared, "That it ſhall not be neceſſary to regiſtrate any bonds "and writs for making reverſions, unleſs the ſaſine paſs in favours of the "parties makers of the ſaid bonds or writs:" conſequently, if *Chatto* younger had granted a back-bond of reverſion, or any other deed in favours of *Bell*, it would have been good againſt his competitor, notwithſtanding his infeftment. And ſurely it cannot be doubted, but a direct diſpoſition or conveyance of an incompleat real right, muſt be equally available to affect it in prejudice of the granter's ſingular ſucceſſors, who obtain themſelves infeft, when their author was not infeft, as a latent back-bond? In point of juſtice, there is no difference; and, in a favourable view, the direct deed ſurely deſerves more countenance.

On the other hand, it was *urged* for *Garthſhore:* That, ſo long as the competing rights remained perſonal, the rule, *Prior tempore potior jure*, behoved to take place; but, as there was more in young *Chatto* than a mere perſonal right, to wit, a power and faculty in him to have made it real, by which only the *dominium* of the ſubject could be transferred; and, this being carried, in virtue of the charter from the ſuperior, whereby old *Chatto* was denuded, the real right was eſtabliſhed in *Garthſhore*'s perſon. It is true, he might have infeft young *Chatto*, in order to have validate the purchaſe he ſhould make from him; but the method here followed, of eſtabliſhing a legal title to the decreet of ſale, is the ſame thing with the reſignation as flowing from old *Chatto*, whereby all intermediate perſonal rights came to be abſorbed, and the real right, in old *Chatto*, by the act of the ſuperior, veſted in *Garthſhore:* ſo that he alone, and no other, was liable for all the caſualties ariſing from the fee; conſequently, he muſt from thenceforth be intitled to the rents and profits thereof. The parallel brought from aſſignations to perſonal rights tends to ſupport the contrary to what it is adduced to prove; for, as it is acknowledged, that, notwithſtanding of a firſt aſſignation, the radical right remains with the cedent, in ſo much that an after-aſſignation firſt intimated will be preferred; ſo the radical right of the fee remaining with old *Chatto*, the decreet

creet of ſale and after-aſſignation, gave a power to the aſſignies to compleat their real rights, and diveſt him; which being done, the radical right thereafter came to be veſted in that party who compleated the real right; as in aſſignations to perſonal rights, it is performed by the firſt intimation. Nor does the clauſe in the act referred to make any alteration in the preſent queſtion; becauſe it does not ſay, That the firſt latent bond of reverſion, upon a perſonal right, muſt have preference to others, who, having carried the ſame, have compleated it, by eſtabliſhing a real right thereupon. This being left to the diſpoſition of the common law, as it ſtood before the act; and by that *Garthſhore*, as having the only compleat real right in the ſubject, falls to be preferred to his competitor; who, ſuppoſe his titles were now lawfully made up, would have no manner of right in it at all.

The Lords preferred John Garthſhore.

N° LX. *June* 23. 1737.

James Mitchel, contra *Mitchel* of *Blairgorts*.

Tho' an Executor-creditor, or neareſt of Kin, die before executing the Teſtament, there is no Place for an Executor ad non executa.

Mitchel of *Alderſton* being debtor to *James Mitchel* taylor in *Edinburgh*, by bond, the ſame, after the creditor's deceaſe, was confirmed by *Patrick Mitchel* his brother, upon the title of executor-creditor. *Patrick*, the executor, died, without renewing the bond in his own name; after whoſe death, his ſon *James* confirmed it as *in bonis* of his deceas'd father, and then conveyed the bond to *Mitchel* of *Blairgorts*.

Another *James Mitchel* being creditor by decreet to the ſaid *James Mitchel*, the ſon of *Patrick*, obtained himſelf decerned *executor-dative* to *James Mitchel* the original creditor, upon this ground, That, by *Patrick*'s dying without executing the teſtament, the bond returned to be *in bonis* of the original creditor; to whom *James Mitchel* his debtor came to be neareſt of kin, upon his father *Patrick*'s deceaſe; and, on this title, he inſiſted in a proceſs, on the act 1695, againſt *Blairgorts*; concluding, it ought to be found, that he had the only right to the bond.

For *Blairgorts* it was *pled:* That the bond in queſtion was fully eſtabliſhed in the perſon of *Patrick*, without neceſſity of any execution; and that, by his deceaſe, it tranſmitted to his ſon without falling back *in bonis* of the firſt defunct, ſo as to give acceſs to a confirmation *ad non executa:* in ſupport whereof, it was obſerved, That, tho' executry is but an office, and, as ſuch, gives no right of property, unleſs the executor execute the teſtament, either by getting payment, renewing the bond, or taking decreet; yet, where an executor-creditor, or neareſt of kin, is confirmed, a right of property is tranſmitted, by confirmation alone, as is laid down by Lord *Stair*, *tit. Executry*, § 5. who ſays, "That, with regard to the "neareſt of kin's intereſt, confirmation is *additio hæreditatis in mobilibus.*" Therefore, whoever is confirmed executor, the neareſt of kin exiſting at the time obtains thereby the right to be eſtabliſhed in them; ſo as without

out further to tranſmit to their repreſentatives; and, ſimilar to the confirmation of the neareſt of kin, is that of an executor-creditor, which is underſtood to be a legal diligence eſtabliſhing the ſubject in the perſon of the creditor: nay, if an executor-nominate ſhould aſſign to the neareſt of kin any ſhare of the moveables, in lieu of their claim, this *de praxi* is underſtood to be an execution of the teſtament *pro tanto*, in ſo much that the aſſignation does not fall by the executor's death; confirmations, therefore, by thoſe who have an intereſt in the moveables, are very different from the caſe of thoſe who have no right in them, except the bare office: the laſt is a truſt which is perſonal, and muſt die with the truſtee; the other ſort are of the nature of procuratories *in rem ſuam*, which, being given by the law, cannot die.

Anſwered for the purſuer: Confirmation alone does not fully convey the particulars in the inventary of the teſtament confirmed, ſo as to take them out of the *hæreditas jacens* of the defunct, and veſt them in the executor, ſomewhat more being requiſite, *viz.* That the teſtament ſhould be execute; wherefore, if the executor die before that happen, the title cannot otherways be made up, than by a confirmation *ad non executa* to the firſt defunct. Nor is there any difference, in this reſpect, between an executor who has but the naked office, and an executor-creditor, or neareſt of kin; becauſe, if confirmation alone does not operate a tranſmiſſion to the one, neither ought it to have that effect in favours of the other; as it is not conceivable how the different intereſts of executors ſhould vary the nature of the conveyance, or that the ſame form of title ſhould operate different effects, ſo as to ſerve for a full tranſmiſſion to one, and not to another. Neither does the diſtinction now pleaded for, meet with any ſupport from our lawyers; for Lord *Stair*, *tit. Executry*, § 61. lays it down, in general, That, if all the executors be dead, and any part of the teſtament unexecute, then there is place for executors *ad non executa*, which he cannot be ſuppoſed to mean only of executors-nominate. See *Dirleton*, *verb. Executor*, and Sir *James Steuart*; both of whom plainly ſuppoſe confirmation *ad non executa* neceſſary in the caſe of an executor-creditor's dying, without executing the teſtament. It may be true, That, where there is confirmation, the neareſt of kin tranſmits his right, *i. e.* the claim with which the executry might have been burdened; but it is denied, that confirmation alone tranſmits any title to the ſpecific ſubjects of the firſt defunct's executry, ſo as to give the neareſt of kin a direct right to the executry. And, what proves this diſtinction to be well founded, is, That, if the moment an executor-nominate was confirmed, the neareſt of kin acquired a direct right to the defunct's executry; it would follow, That he might demand payment, intent actions againſt debtors, or aſſign the debt to third parties, none of which things he can do; of courſe, he cannot tranſmit to another what was not in himſelf.

As to the inſtance of an executor-nominate's aſſigning to the neareſt of kin, which is underſtood to be an execution of the teſtament, it was anſwered, That, if ſuch an executor aſſign, it will intitle the aſſigney to ſue the debtor; and, if he obtain decreet before the executor die, the aſſignation may be good; but, if he die before decreet, it is believed, the aſſig-

nation would fall with the cedent's right; becauſe, till the teſtament is execute, the executor is not fully in the title.

The Lords found, That Patrick Mitchel *having confirmed the* 2000 *merks and intereſt in diſpute, as creditor to his brother* James Mitchel *taylor, to whom he was neareſt in kin, the property thereof belonged to* Patrick, *from the time of the confirmation, and was* in bonis *of* Patrick, *at his death; and that* James Mitchel, *the ſon and executor of* Patrick, *having confirmed the ſame, might habily aſſign the ſame to* Blairgorts; *and found the confirmation of* James, *as executor-creditor* quoad non executa, *was inept and void; and therefore found* Blairgorts, *the aſſigney, preferable.*

N° LXI. *June* 28. 1737.

Thomas Dinwoodie, contra *William Johnſton.*

1. *Bills may be ſigned by a Notary.* 2. *Are ſuſtained, tho' bearing Annualrent, from the Date, and before the Term of Payment.*

ON the 2d *February* 1728, *Johnſton* drew a bill upon *Dinwoodie*, payable at *Martinmaſs* thereafter, with annualrent from the date; the acceptance of which, in regard *Dinwoodie* could not write, was adhibite by a Notary before two witneſſes. Of this bill, he intented reduction, on the following reaſons: 1*mo*, Becauſe it was accepted by a Notary. 2*do*, in regard it bore annualrent from the date: and, in ſupport of the firſt, it was obſerved, That regularly no writing is valid, unleſs it be either holograph or duly ſigned before witneſſes; from which rule, bills of Exchange are excepted, for the ſake of commerce. It is true, if a perſon cannot write, the law allows Notaries to ſign for him; but then it is neceſſary, in order to render ſuch an obligation valid, that the witneſſes be inſert; of conſequence, if the writing does not admit the inſerting them, which is the caſe of bills, it is illegal to attempt to ſubſcribe ſuch writings by Notaries: and here the Notar ſeems to have been ſenſible of this difficulty, as he has attempted to introduce a new form, not practiſed in the ſubſcription of regular deeds, ſigned by Notars; namely to inſert the witneſſes names and deſignations in his docquet, which does not come up to the law, it not being in the body of the writ: but, *in græmio*, as it were, of the party's ſubſcription, for ſuch the Notar's declaration is, when regularly gone about. In ſhort, this writing does not come under any known deſcription in law; as it is neither holograph, nor bears the Writer's name, and witneſſes, nor a bill, ſuch as people are generally acquainted with.

With reſpect to the *ſecond*, it was *pled:* That bills are not deſigned to be ſtanding or abiding ſecurities; therefore they ought not to be ſo conceived, as to bear intereſt from their date, and thereafter, during the not payment; as that is plainly exceeding the proper uſe for which they were at firſt introduced, and altering the very nature of them: *e. g.* bills, tho' carrying intereſt *ex lege*, after the term of payment, are ſimply moveable; and, as ſuch, fall under the *jus mariti* and *relictae*; but a bill, in this form, would be heritable in theſe reſpects, as carrying intereſt *ex pacto*. And,

tho'

tho' the acts 1681, and 1696, do not, in expreſs words, prohibite ſuch a ſtipulation; yet it is plainly enough implied, by enacting, That bills ſhall carry intereſt from the term of payment; which ſhows it was taken for granted they are not a ſecurity carrying intereſt *ex pacto*: therefore this clauſe, as incongruous to the nature of the writing, muſt be fatal to it, in the ſame manner as if it had bore a penalty, which is only a greater deviation from the deſign of bills.

Anſwered to the *Firſt*: That, as bills are a kind of ſecurity, which were introduced by cuſtom, and not by ſtatute, they do not fall under any of the regulations neceſſary to be obſerved in the form of other writings; conſequently, arguments, drawn from the ſtatutes regulating the form of other deeds, are not in point. At the ſame time, it may not be improper to obſerve, That the ſubſcription of one or two Notaries is, in all things, equiparat to the ſubſcription of the party; therefore, where nothing but the ſubſcription of the party is requiſite to conſtitute a valid obligation, it follows, that a notorial ſubſcription is equivalent. Nor is there any thing in the obſervation, That the witneſſes are not deſigned in the body of the writ; ſeeing the acceptance is part thereof, and the Notar's docquet ſubjoined to it is likewiſe to be conſidered as part of the writ, as much as the clauſe in other writings, *in witneſs whereof*, &c. It is true, the form of this bill is uncommon, yet it is not ſo on account of any bad thing, but for being deviſed in a way, which, if enjoined by law, would, in a great meaſure, take away the cauſe of that *odium* which many have to bills: for, inſtead of a mark, inſtead of initials, which are ſufficient to validate ſuch a writing, there is here the ſubſcription of a Notary, whoſe faith, in the affair of bills, is great; and two witneſſes, ſpecially required to his being deſired to ſubſcribe, both fully deſigned, and ſigning with him: ſo that there is no room left to doubt of the tranſaction's being fair and honeſt, as well as valid.

To the *ſecond*, it was *anſwered*: That there is no reaſon for annulling a bill, becauſe it bears a ſtipulation for intereſt from the time of the loan; as it is very common to accumulate the annualrent from the date to the term of payment; and ſo render it a *ſors*, bearing intereſt, in caſe the accepter does not pay at the day prefixt, altho', it is plain, he is thereby put in a worſe condition: How hard then would it be for the defender to loſe his debt, for want of ſkill to cover the tranſaction? if the thing be lawful, it is not the worſe for being fairly and openly expreſſed. As to the ſtipulation of annualrent on a bill before the term of payment's being diſcharged by the acts referred to, it was anſwered, 1*mo*, Granting it were true, ſtill the adjecting ſuch a ſtipulation is not ſufficient to annul ſuch a writing, but only that the ſtipulation ſhould be ineffectual; for, notwithſtanding ſuch adjection, it would yet remain a bill, as having all the eſſentials of one, a drawer and an accepter: ſo that the rule, *Utile per inutile non vitiatur*, behoved to take place. And, as to the inſtance of a bill with a penalty being found null, it does not touch the preſent queſtion; ſince a penalty may be ſaid not to be the ſubject of a bill more than a legacy or donation. But, 2*do*, Neither of the acts will bear ſuch a conſtruction, the deſign thereof being only to authoriſe charges of horning to paſs upon bills,

bills, which before were only the ſubject of an ordinary action; and therefore we are not to look there for a deſcription of ſuch deeds.

The Lords repelled the reaſon of reduction, founded on the Notary's acceptance, and likewiſe the objection, That the bill bore annualrent from the date.

N° LXII. *Eodem Die.*

Competition, *Elizabeth Borthwick* with the Trades Maiden-Hoſpital.

1. *A reſerved Power in a Wife to burden, with Conſent of her Huſband, any Time during her Life, may it be exerced after the Huſband's Death?* 2. *Does an unlimited Faculty to burden imply a Power to diſpone?* 3. *Homologation.*

Isobel Halyburton, with conſent of *Samuel Nimmo* her huſband, *anno* 1713, granted a diſpoſition of a tenement in *Edinburgh*, to the ſaid Hoſpital, under condition, That, by acceptation thereof, the managers ſhould be obliged to pay certain ſums to particular perſons, at the firſt term after her and her huſband's deceaſe; "reſerving her own liferent, "and a power to burden the ſame with her huſband's conſent, with what "other ſums ſhe ſhould think fit, to any other perſons, by a writ under "her hand, at any time in her lifetime." After the date of this deed, the huſband died, and, *Iſobel* being diſſatisfied with the legacies ſhe had left, raiſed a reduction thereof; but, it would ſeem, that ſhe had then no intention to alter the deed to the Hoſpital: for, in the year 1719, ſhe granted a bond to it, reciting the mortification, and that ſhe had raiſed a reduction for annulling the burdens thereon, but that ſhe had no deſign to hurt the Hoſpital; therefore ſhe obliges herſelf, That, in caſe ſhe prevailed in that proceſs, ſhe ſhould pay to the managers 1200 merks; but, if ſhe did not, then they were to make uſe of the diſpoſition or not, as they ſhould think fit.

Anno 1723, ſhe execute a new diſpoſition of the ſame ſubject in favours of *Elizabeth Borthwick*; who, in virtue thereof, having raiſed an action of mails and duties againſt the poſſeſſors, a competition enſued betwixt her and the Hoſpital; in which the purſuer craved to be preferred: 1*mo*, Becauſe *Iſobel Halyburton*, in the firſt diſpoſition, reſerved a power to burden the tenement with ſuch ſums as ſhe ſhould think fit; which implied a power to alter at pleaſure, even without any onerous cauſe. 2*do*, That ſhe was preferable upon her diſpoſition, in regard ſhe was firſt infeft.

To which it was *anſwered* for the Hoſpital: Tho' the diſpoſition in their favours reſerves a power to the granter to burden with what ſums ſhe pleaſed, yet that power could not be impoſed, but during the joint lives of the granter and her huſband; the meaning of the deed being, That ſhe was to have that power any time in her life, with her huſband's conſent; therefore it could only be exerced during their joint lives. 2*do*, Granting ſhe might have exerced the faculty to burden after the huſband's deceaſe, ſtill it does not follow, ſhe had a power to diſpone; ſeeing it is certain no fee can be diſponed, but either where the property is in the diſponer,

diſponer, or an expreſs faculty to diſpone the ſame. Beſides, there is this difference betwixt theſe two powers, *viz.* That, in the caſe of a burden, the grantee hath an option to keep the fee, if he pleaſes; but it does not follow, That, becauſe one has a power to burden, ſo as to render the fee uſeleſs, that therefore he can give away the ſame: *e. g.* an apparent heir may grant a bond, on which his predeceſſor's eſtate may be adjudged, and rendered uſeleſs to the next heir; yet, if he diſpone, ſuch diſpoſition will be good for nothing; becauſe he had no fee in him. Again, an heir of entail, who is prohibited to ſell, but left at liberty to contract debt, may exhauſt the eſtate by ſuch contraction; and yet, if he ſell his diſpoſition, can be of no avail; therefore the diſpoſition in favours of the purſuer, tho' with the firſt infeftment, can have no effect. In the next place, ſuppoſing, for argument's ſake, *Iſobel Haliburton* had a power to alienate, yet the ſame is plainly paſt from, by the bond which ſhe granted to the Hoſpital; as it truly imports a tranſaction, That, in the one caſe, the Hoſpital was to have the money, and, in the other, the event that happened to be allowed the uſe of her right: ſo that to ſuppoſe, after ſuch an act of homologation, that ſhe had a power to diſpone, is to argue contrary to the deſign or intention of the bond.

Replied for the purſuer: It is a rule in the interpreting donations, That they ought to be conſtructed in the moſt favourable way for the donor; and, on the other hand, in the ſtricteſt way againſt the donator; of conſequence, the reſerving clauſe here ought to be interpreted in ſuch a way as not to exclude the diſponer from the exerciſe of the reſerved faculties while alive, by the huſband's predeceaſing her. It is true, inſtances may be given, where a power granted to two cannot be exerced by one, after the death of the other; but the caſe is quite different, where a proprietor reſerves a power over his own eſtate during his life, to be uſed with the conſent neceſſary by law, there the conſent will not be underſtood to be a limitation upon the reſerved power; but the expreſſing what *inerat de jure*: *e. g.* If a minor diſpone, with a power to alter at any time of his life, with conſent of his curators; the conſtruction would be, That, while the curatory ſubſiſted, their conſent ſhould be neceſſary; but it could never be interpreted, That, after the curatory ceaſed, their conſent ſhould be requiſite; juſt ſo, the reſerved power in the preſent queſtion muſt import a deſignation of the form in which it was to be exerced, but not a limitation.

With reſpect to the *ſecond* point, it was obſerved: There was no foundation in the clauſe for reſtricting *Iſobel Halyburton*'s power, or limiting it ſo as to leave a reſidue to the Hoſpital; and, the reſervation not being confined to onerous debts, no reaſon could be aſſigned for excluding even gratuitous deeds: ſo that, if ſhe had burdened the tenement in favours of the purſuer, with a ſum exceeding the value, an adjudication might have been led in ſatisfaction thereof, which would have indirectly evacuate the firſt right: hence it follows, That ſhe had a power to grant the ſecond diſpoſition; for, as ſuch a reſervation muſt be largely interpret, if the exerciſe of it goes no farther than what was intended, there is no neceſſity that it ſhould be exerciſed in the preciſe terms thereof: *e. g.* If a father diſpone his eſtate with a power to burden, if he grant a perſonal bond, which is properly no burden in terms of ſuch reſervation; yet it has always been held, That the creditor may adjudge the faculty, and make his perſonal bond a real one; becauſe the law conſiders the reſerved faculty as

the donor's eſtate: therefore, as *Iſobel Halyburton* could have burdened the tenement to whatever extent ſhe judged proper, and thereby excluded the firſt right; of conſequence, no more was veſted in the Hoſpital than ſhe pleaſed, it depending on her will, whether they were to have a right or not; and as ſhe has declared her intention that they ſhould have none by the diſpoſition in favours of the purſuer, it cannot be ſaid ſhe acted beyond her powers.

There is no ſimilitude betwixt the caſe of an heir of entail and the preſent queſtion, becauſe limitations, upon heirs of entail, in favours of their own heirs, are contrary to the nature of property; and ſo fall to be interpreted in the ſtricteſt manner: but, a reſervation in favours of a donor is the natural effect of property, that he reſerve it as far as he pleaſes, and grant away no more than he thinks fit. Neither can the inſtance of an apparent heir granting a bond, upon which adjudication may follow, have any influence in the preſent argument; ſeeing ſuch an adjudication will not convey the eſtate of the granter more than his diſpoſition, unleſs he is charged to enter heir in ſpecial; and it is becauſe the law has conſidered this ſpecial charge as equal to a ſpecial ſervice, that it has made ſuch adjudication equal to a diſpoſition: but this has nothing to do with the preſent argument, which is allenarly whether a donor, who has reſerved a power to evacuate his gift by burdening it, can do the ſame thing, and diſappoint his donation directly, by a diſpoſition.

As to the argument drawn from the bond 1719, it is admitted the ſame is an homologation of the mortification; conſequently the granter, or any claiming under her, are precluded from quarrelling thereof, upon the account that it was not granted by her deliberate and voluntary conſent: but then, it is not ſo obvious, how the approbation of a revocable deed can make it irrevocable; for that would be not to homologate, but to alter the deed; and, as it contains no diſcharge of any of the reſervations in favours of the donor, they behoved to remain with her after the homologation.

The Lords preferred the Hoſpital.

N° LXIII. *June* 29. 1737.

The Creditors of the deceas'd *Arthur Tran*, contra the Commiſſary of *Hamilton*.

1. *Can one Commiſſar ſtop a Confirmation going on before another?* 2. *Teſtament, within which Diſtrict muſt it be confirmed?*

THESE creditors procured an edict from the Commiſſar of *Glaſgow*, for ſerving themſelves executors-creditors to the ſaid *Arthur Tran*, believing that to be the proper place for confirming themſelves, their debtor having been, at the time of his death, and for ſeveral years before, a merchant in *Glaſgow*, who reſided there the moſt part of the year, and bore the office of Dean of Gild when he died: but the Commiſſar of *Hamilton* oppoſed the confirmation, alledging, That it properly belonged to him, in regard the defunct died at *Edlewood*, a houſe belonging to himſelf in the

pariſh

pariſh of *Hamilton*, upon an eſtate handed down to him from his anceſtors, where he uſually lived ſeveral months in the year, and at which he actually had been with his wife and family ſeveral months before his death.

Anſwered for the creditors: Now, that quots are aboliſhed, and the neceſſity of confirming taken away, it is *jus tertii* to the Commiſſar to oppoſe this confirmation, as he has no intereſt himſelf in the eſtate of the defunct; for he can neither force any to confirm, nor can he ſtop a confirmation that is going on, or delay the creditors from entering to their debtor's effects, who, if they pleaſe to run the hazard, may poſſeſs without confirming at all; or, if they confirm before an improper judge, it could have no effect in competition with other creditors. But ſtill the Commiſſar has no right to quarrel it, as every creditor muſt be allowed to judge for himſelf what he takes to be the proper place for deducing his diligence; ſeeing it is at his own riſk, if it is improperly led. 2*do*, Suppoſing this were a competition of diligence betwixt creditors, it is believed, there could be no doubt but the Commiſſariot of *Glaſgow* would be found the only proper juriſdiction for confirming the teſtament of this defunct, in regard his chief reſidence was in *Glaſgow*. It may be true, that he ſometimes reſided in the Summer-time in the country with his mother, who liferented the eſtate; but then it was more properly as a viſit than as having any houſe of his own there, and a perſon's happening to be abſent, at the time of his deceaſe, from the place of his chief reſidence, can make no alteration, if he retained the purpoſe of returning.

Replied for the Commiſſar, to the *firſt*: Tho' he does not pretend to compell any of the lieges to confirm, yet, if a teſtament of a defunct dying within his juriſdiction is to be confirmed any where, he has a legal intereſt to oppoſe its being expede by an incompetent judge, conform to the regulations 1666; the 14th article whereof provides: "That, if "any temporal judge within this realm will proceed in cauſes belonging "to your juriſdiction, you ſhall direct precepts for inhibiting them from "all further procedure thereuntil." Which, as it is an authority in point, ſo the uniform practice has been, when encroachments of this kind were attempted, to iſſue ſuch precepts; therefore it is not to the purpoſe, whether a confirmation by an incompetent Commiſſar would be available or not; ſeeing it is plain the creditors have in view to eſtabliſh a title, in virtue of which they may intromit with the moveables; and, as theſe may be embezeled, it cannot be officious in the Commiſſar, to whom the law has entruſted the charge of the defunct's effects, to prevent their being intromitted with by one having no right: but, as it is plain the Commiſſar has a privative juriſdiction in this queſtion, he may vindicate his right, and reclaim any proceſs intented before an incompetent court, as is practiſed by the Judge-admiral in maritime cauſes.

Upon the *ſecond* point, it was obſerved: That, here the only queſtion is, with reſpect to the fact, *viz.* within what juriſdiction the defunct's principal domicile lay, as it is that muſt determine the legal tion of his moveables. Taking the matter in this view, the right is clearly on the ſide of the Commiſſar of *Hamilton*; for the ~~defini-~~ relation of a domicile is, *Ubi larem rerumque, ac fortunarum ſuarum ſummum conſtituit*; which, from the circumſtances of this caſe, is the eſtate of *Edlewood*, where the defunct reſided conſtantly every year, for ſeveral months;

months; and even kept ſervants there the reſt of the year, when, for the conveniency of living, he chuſed to leave the country, and live in a town.

There is therefore a great difference betwixt this domicile, where he died, and that of *Glaſgow*, which is eſtabliſhed only from the defunct's being a merchant, ſometimes in the magiſtracy, and reſiding ſome months in that town; which, being neither fixed, nor in its nature perpetual, can ever compete with that which a gentleman has fixed in the country, upon his own eſtate. Beſides, if there was any dubiety in the matter, the preſumption is for the original domicile; or, as *Voet.* explains it, in his title *De Indiciis*, § 97. the *Domicilium paternæ habitationis.* See *Simon Vanleuen*, in his *Cenſura forrenſis*, *l. penult. De Senat.* Competition, creditors of Lord *Kimmergham.*

The Lords found it not competent to the Commiſſar of Hamilton *to object to the confirmation before the Commiſſar of* Glaſgow.

N° LXIV. *Eodem Die.*

Yaxly Davidſon, contra *Anna Brown.*

The Act 1696 *reaches Caſes, where the Bankrupt flies before the Days of the Charge are elapſed.*

IN the reduction, betwixt theſe parties, of an heritable bond on the act 1696, as having been granted by *Andrew Brown*, within the ſixty days of his bankruptcy, it was objected; That, from the proof which had been adduced, it appeared, that the granter, who was a ſailor and merchant, had gone abroad, in the way of his buſineſs, before the caption was taken out; ſo that he could not be ſaid to fly or abſcond, in terms of the act, from diligence which was not taken out until after he had left the kingdom. If indeed he had retired into the *Abbay* before the caption, it might have implied a confeſſion of bankruptcy; but the following out the courſe of one's trade, cannot admit of ſuch a conſtruction.

Anſwered: Diligence by horning and caption, are named, in the act, before the alternatives of flying, abſconding, *&c.*; becauſe that is the caſe which moſt commonly happens. But it does not follow, That one, who goes off upon the horning, without waiting till the caption can be got, which might perhaps be a hindrance to his deſign, can never be conſtitute a bankrupt, ſo as to have his unjuſt preferences reduced; and, with what view *Andrew Brown* went off, is not eaſy to determine, that being *actus animi:* but, from the ſeveral circumſtances of this caſe, it is preſumeable, the fear of being thrown into priſon was the reaſon why he fled, which is the more probable, as he has continued for two years out of the country longer than his ordinary buſineſs as a merchant can be ſuppoſed to detain him; and, if the act ſhall be otherways interpret, it will open a door to many frauds.

The Lords ſuſtained the reaſon of reduction on the act 1696.

N° LXV.

N° LXV. *Eodem Die.*

Kirk-Seſſion of *Inverask*, contra Kirk-Seſſion of *Tranent*.

Action at the Inſtance of one Kirk-Seſſion againſt another, for maintaining a Child.

Margaret Liſle, who reſided many years in the pariſh of *Tranent*, married a ſoldier occaſionally quartered there, to whom ſhe bore a child; and thereafter, having gone from thence in her way to *Ireland* with her huſband, ſhe left, or expoſed the child in the pariſh of *Inveraſk*; which having been found and taken care of by that kirk-ſeſſion, a proceſs was brought, at their inſtance, againſt the kirk-ſeſſion of *Tranent*, before the Commiſſars of *Edinburgh*, in order to have the defenders decerned to take that burden off their hand: which being advocate, the purſuers chiefly inſiſted on an argument drawn by inference from the 16th act 1663, concerning beggars and vagabonds, whereby the legiſlator conſidered the place of birth as making an indelible relation to a pariſh; and, to the ſame purpoſe were quotted the acts 22. *James* V. 74. Parl. 6. *James* VI. ratified by 21ſt act, Seſ. 7. 1ſt Parl. King *William*.

The Lords found, That no action lay at the inſtance of the kirk-ſeſſion of Inveraſk, *againſt the kirk-ſeſſion of* Tranent.

N° LXVI. *June* 30. 1737.

James Baillie, contra *Watſon* of *Saughton*.

A ſpecial Adjudication is not redeemable, without Payment of the principal Sum, Annualrents, and a fifth Part more.

THE queſtion betwixt theſe parties was, Whether, in the redemption of a ſpecial adjudication, the creditor is intitled to a fifth part more than the principal ſum, and annualrents accumulate in the decreet.

The arguments for the reverſer were: That, by the firſt clauſe of the act 1672, concerning ſpecial adjudications, it is ſtatute: "That the "Lords ſhall adjudge ſuch part of the debtor's eſtate as ſhall be worth the "principal ſum and annualrents then reſting to the creditor, and a fifth "part more, in reſpect the creditor wants the uſe of the money." Whereby it is plain, the fifth part does not become a debt on the reverſer, nor ought the adjudication to be led for payment thereof; as the act only provides, That ſubjects, equal in value to the accumulate ſum, and a fifth part more, ſhall be adjudged; conſequently, ſince the ſtatute does not direct that this fifth part ſhall be added to the accumulate ſum, and become a debt on the reverſer, it is impoſſible, in the caſe of a redemption, he can be bound to pay it. The reaſon likeways aſſigned in the law for adding the fifth part, *viz.* in reſpect the creditor wants the uſe of his money, and is neceſſitate to take land for the ſame, plainly ſhows, That,

when the creditor gets back his money, he is by no means intitled to the fifth part; for, in that event, the only reaſon aſſigned for allowing it ceaſes. Nor does the poſterior clauſe, concerning the redemption, admit of this conſtruction; as the lands are thereby declared redeemable, "upon payment of the principal ſum and annualrents." Now, there can be no doubt, but theſe words muſt have the ſame meaning here as in the former clauſe, *viz.* "The principal ſum and annualrents thereof reſting "to the creditor;" under which characteriſtic the fifth part more can never be comprehended. It is true, the extent of the ſubjects adjudged muſt be equal in value to the principal ſum and annualrents, and a fifth part more; but the extent, or value of the ſubject adjudged, cannot augment the ſum, for payment whereof ſuch ſubject is adjudged. Nor is it any objection to this ſenſe of the words, That, at this rate, the adjudger, in the event of a redemption, ſhall not only looſe his penalty, but even the expences of his diligence; ſeeing a ſtatute muſt be taken as it ſtands, and cannot be altered, but by the legiſlative power that introduced it. However, if it ſhall ſeem juſt that the expences be given to the creditor upon redemption, the ſame, by an equitable interpretation, may be found to fall under the words of the clauſe, "The expences of the infeft-"ment;" which may include the expences of the diligence led previous thereto.

For the adjudger, it was contended: That, by the ſtate of our law, with reſpect to appryſings and adjudications, it was plain, 1*mo*, That the accumulate ſum, in an adjudication, bears annualrent from the date of the decreet, tho' the ſum, before that period, did not bear annualrent, and that in conſequence of the ſtatute 1621. 2*do*, When, by the act 1672, ſpecial adjudications are allowed to be led, not only for the principal ſum and annualrents, but alſo for a fifth part more, the accumulate ſum was to bear annualrent. 3*tio*, Neither by the antient or modern law an appryſing or adjudication could be redeemed, but upon payment of the accumulate ſum contained in the adjudication, and annualrents grown due thereon, ſince the decreet, in ſo far as theſe were not ſatisfied by the creditor's intromiſſion. It is true, there is this difference betwixt the law as it now ſtands, and as it ſtood formerly, *viz.* That, by the ſtatute 1469, the lands were valued, and no more was appryſed than was ſufficient to anſwer the accumulate ſum; ſo that there was no accounting for the *interim* rents, nor for the bygone annualrents, and the redemption was upon payment of the accumulate ſum: but, by the act 1621, when appryſings were general of the debtor's whole eſtate and annualrents, were declared to be due upon the accumulate ſum, there behoved to be an accounting before redemption, ſuper-intromiſſions imputed to the accumulate ſum; and, if the rents did not anſwer the annualrents, the debtor behoved to make good the deficiency of the annualrents, as well as the accumulate ſum, before he could redeem: and ſo the law ſtands, with reſpect to general adjudications, upon the ſtatute 1672. But, in ſpecial adjudications upon that law, if the creditor attain the poſſeſſion, there is no acounting for rents; ſeeing he has lands anſwerable to his accumulate ſum, which includes the fifth part, as well as the original debt; and therefore, in that caſe, the adjudication is redeemable, upon payment of the accumulate ſum in his adjudication, with the expences of infeftment, &c: but, if he is barred from the poſſeſſion, or if it does not yield the rent, then the

adjudication

adjudication is not redeemable, but upon payment of the accumulate ſum and annualrents.

The law ſo ſtanding, it would be a very extraordinary interpretation of this act, That, tho' it allows the creditor to adjudge for a fifth part more, *i. e.* has impignorate the lands for ſecurity thereof, yet it ſhould allow this pledge to be redeemed without payment of the fifth part, for which it was impignorate. 2*dly*, That the act ſhould allow the creditor a fifth part more for the want of the uſe of his money, as more beneficial than the penalty, which may be adjudged for in the general adjudication, and yet the lands ſhould be no ſecurity for this fifth part, but that they ſhould be redeemable without payment thereof; when it muſt be admitted, that a general adjudication for the penalty is not redeemable, without payment of the penalty, and intereſt grown due thereon.

As to the argument, That a ſpecial adjudication is ſuppoſed by the act to be redeemable, upon payment of the principal ſum and annualrents for which it did proceed, it was anſwered, The intention of the clauſe was not to ſettle the conditions of the reverſion, theſe being eſtabliſhed by the common law, *viz.* That the pledge could not be redeemed without payment of the debt, for which it was impignorate. And as, by the former part of the clauſe, the lands were to be adjudged in ſecurity of the principal ſum and annualrents, and a fifth part more, it needed no ſtatute to determine, That, upon payment of thoſe, together with the growing annualrents from the date of the decreet, the lands ſhould be redeemable. But what is ſingly intended, was, to limit the legal of ſuch ſpecial adjudication, that it ſhould not endure ſo long as that of a general one. The obſervation anent the fifth part's being added, only becauſe the creditor is neceſſitate to take land for the ſame; therefore, when he got his money, the reaſon of giving it ceaſed, is to miſconſtruct the law; for the creditor wants the uſe of his money, when he cannot obtain payment, but is forced to adjudge, which being a ſale, the creditor is obliged to make; therefore the law gives him a fifth part more, without any conſideration of what ſhall afterwards occur, whether the debtor happen to redeem the lands or not.

The Lords found, That the redemption could not proceed, but upon payment of principal ſum, annualrents, and a fifth part more; and therefore found the order of redemption void.

N° LXVII. *July* 8. 1737.

Francis Scot, contra Lord *Napier*.

1. *A Defender, cited as a Haver, is not obliged to depone, unleſs a ſpecial Condeſcendance is given in.* 2. *Lawyers, Agents,* &c. *called as Havers, are bound to anſwer only ſuch Interrogatories as are competent to be put to their Client.*

IN the reduction and improbation betwixt theſe parties, the defender produced a charter and ſaſine, ſufficient, with forty years poſſeſſion, to exclude the purſuer; whereupon he took out a diligence in general to prove

prove interruptions; and, having execute it againſt the defender, " The " Lords found he was not bound to depone, unleſs a ſpecial condeſcen- " dance was given in of writs called for to be exhibited.

Thereafter, the purſuer inſiſted, That the Lord *Napier*'s doers and agents ſhould depone, in general, as well as any other havers. To which it was objected, That they were not bound to depone otherwiſe than the defender himſelf was, they being the ſame with himſelf. At adviſing whereof, " The Lords found, That no interrogatories could be put to " Lord *Napier*'s lawyers and doers, as to any papers they had occaſion to " ſee in the courſe of their employment, but what might have been put " to my Lord himſelf.

The purſuer reclaimed; and ſet forth, That, if any of the defender's lawyers, *&c.* have had imparted to them the knowledge of any particular writing, under confidence not to reveal the ſame, he was willing they ſhould be excuſed from deponing upon ſuch writing: but, as to thoſe they have ſeen in the common courſe of their buſineſs, under no particular tie of ſecrecy, there could be no reaſon why the purſuer ſhould not have the benefit of their oaths, with reſpect to ſuch papers, as well as of the party himſelf. *2do*, Granting the lawyers and agents are not bound to anſwer to a general interrogatory, as to ſuch writs which they have come to the knowledge of in the courſe of their employment; yet the purſuer has reaſon to believe, that one of the defender's agents, who was called to depone, had an opportunity to ſee ſeveral writs that are now in Lord *Napier*'s charter-cheſt, before he was employed by his Lordſhip. As to which, there was no reaſon why he ſhould not depone, in general, upon theſe, as well as any other party called. Beſides, he has ſeen other papers, ſince he was my Lord's doer, in the hands of third parties, as to which he ſhould alſo depone. *3dly*, It was prayed, That Chamberlains, factors, and other truſtees, ſhould not be comprehended under the interlocutor.

The Lords adhered.

N° LXVIII. *July* 22. 1737.

James Blair and *John Nairn*, contra *Robert Freebairn*.

Office of King's Printer to one and his Heirs and Aſſignies, if adjudgeable.

THE queſtion betwixt theſe parties, was, Whether or not a gift from the Crown, to the ſaid *Robert Freebairn*, his heirs, aſſignies, and ſubſtitutes, of being the King's ſole printer for 41 years, was adjudgeable. The arguments urged for the defender were, That every debtor ought to diſpone in ſatisfaction of a juſt debt, and, if he refuſed, the law would do it for him; but, where he could not, the law cannot interpoſe. It was further pled, in general, That, if a right may be aſſignable, but not without the conſent of a third party, no creditor, until ſuch conſent is obtained, can pretend to adjudge, under colour that his debtor unjuſtly refuſes to aſſign.

It

It was likeways *argued*: That there are ſeveral offices, where a *delectus perſonæ* is abſolutely neceſſary; and, to intruſt the officer with choicing his ſucceſſor in ſuch offices, would be dangerous to the conſtitution: *e. g.* To ſuppoſe a bench of Judges, who had right to their offices by diſpoſitions or adjudications, would be abſurd. It is true, there is no ſtatute concerning this matter; but, where perſonal qualifications are neceſſary, incroachments againſt this rule are ſecured by the law of common ſenſe and public utility. And, if a grant of them were given to aſſigneys, it is believed, ſuch a clauſe would have no effect. Now, to apply theſe things to the caſe in hand, it may not be improper to obſerve, That, altho' monopolies are reckoned illegal, and a great grievance to the ſubject, yet the neceſſity of government, and the good of the nation, forced a monopoly to the King's printer; for, if irreligious and heretical perſons had the power of publiſhing religious books, ſeeds of ſchiſms and hereſies would, with great eaſe, be ſown, to the ſubverſion of religion: or, if ſeditious perſons had a power of printing, for acts of parliament, what they thought fit, dangerous conſequences might follow, which made it neceſſary, that the ſole right of printing ſhould be in one appointed by the Crown: ſo that, from the nature and circumſtances of this office, it cannot be adjudged. Beſides, if this is allowed, the conſequence would be, that a taylor would become the King's ſmith; and, *vice verſa*, tho' both offices were given (or are ſuppoſed to be given,) to perſons who are in a condition properly to diſcharge the duty of the office, and which is ſuppoſed here, as appears from the preamble to this grant.

It is a ſeparate queſtion, Whether or not, if a ſalary were annexed to an office, the ſalary might be adjudged; as the profits which ariſe to the King's printer might, by diligence, be carried off by his creditors; but the office itſelf can never be conveyed in that manner. Indeed, a King's printer may enter into articles of agreement concerning the profits, which he may be compelled to ſtand to; but he can no more be denuded of his office, by adjudication, or diſpoſition, than a burges can of his burgeſhip, or any other perſon of the freedom of an incorporation.

And, as the freedom of a burgh, or of an incorporation, cannot be conferred, without the conſent of the community or incorporation; ſo none can be King's printer without the conſent of the Sovereign. Nor is it any objection, That this grant is to aſſignies; becauſe in conſiſtence with the reſt of the gift, they cannot extend further than ſubſtitutes, who are likeways mentioned, and for whom the defender is anſwerable. But, even ſuppoſing aſſignies did mean ſomething different from ſubſtitutes, it would reach no farther than aſſignations, with conſent of the Crown: for, to ſuppoſe the defender could dubb every one he pleaſed with being King's printer, and put it in the power of a ſtreet-cadee to print Bibles and acts of parliament, can never be ſuppoſed to have been the meaning of the Crown.

Anſwered for the purſuers: There is no right whatſoever, which is *in patrimonio*, and deſcends to heirs, that can be with-holden from creditors, as they have a right to affect every ſuch ſubject belonging to their debtor, whether it go to aſſignies or not: but here the grant is expreſsly conceived to aſſignies; therefore, it is odd to plead it cannot be aſſigned, without a new conſent from the Crown, when, by ſuch conſtruction, there could be no meaning at all in adding aſſignies; ſeeing, without that addition, an aſſignation, founded on ſuch conſent, would be valid. At the ſame time, it can be no doubt, there are many offices which would be monſtrous to ſuppoſe tranſmiſſable either to heirs or aſſignies; but where

an office is granted to theſe, or either of them, it is a proof that perſonal ſkill and fitneſs was not the motive of making ſuch a grant, elſe it would never have been communicable to perſons unknown to the granter. Such a gift partakes more of the nature of a right and priviledge than of an office of truſt; and this is the caſe of grants which do not neceſſarly require to be exerced by the patentee himſelf, but may be ſufficiently executed by others.

The defender's anxiety to prevent the printing of heretical or ſeditious books, is unneceſſary in the preſent queſtion; becauſe ſuch abuſe is not to be ſuppoſed: and, if it were, it could not be guarded againſt by excluding aſſignies or adjudgers; as the firſt patentee might be guilty of ſuch an abuſe as well as an adjudger. Nor is it a good anſwer, That he is intruſted by the Crown; for, beſides that one may counteract his truſt, it is idle to talk of that, where the grant is to heirs who muſt be unknown to the granter; and conſequently cannot be the objects of a particular *delectus* or truſt repoſed in them.

The inſtance of the offices of King's taylor or ſmith do not apply; ſeeing, if theſe were granted to aſſignies, they behoved likeways to fall to adjudgers. Neither is the caſe of a burges or member of an incorporation to the point, unleſs it could be ſhown, that ſuch priviledges were transferable to aſſignies: at any rate, it is *jus tertii* for the defender to make this objection to his own creditors.

The Lords found the office of King's printer adjudgeable.

N° LXIX. *Eodem Die.*

Creditors of *Newlaw*, contra *Samuel Brown*.

1. *Objection to an Adjudication, That it proceeded on a Conſtitution againſt a Minor, without proving any paſſive Title or Production of a general Charge.* 2. *Omitting to execute Letters of ſpecial Charge againſt Tutors, &c. its Effect.*

IN the ranking of the creditors of *Newlaw*, it was objected, That an adjudication, to which *Samuel Brown* had right, was void, in reſpect the decreet of conſtitution, upon which it proceeded, was taken out againſt a minor, without proof of any paſſive title; neither did it libel upon, or bear production of the letters of general charge.

Anſwered for *Brown:* That he now produces not only the ſaid letters, but the execution thereof, dated prior to the ſummons of conſtitution; ſo that, *de facto*, there was an antecedent paſſive title relevant to ſupport the decreet: and, tho' theſe were omitted to be marked as produced, the producing of them now ſhould be ſuſtained, at leaſt to the effect, to make the adjudication ſubſiſt for a ſecurity.

The Lords found the production of the general charge is not now ſufficient, in reſpect the ſame was not founded on in the decreet of conſtitution; but allowed Samuel Brown *yet to prove the paſſive titles libelled.*

IN the *next* place, it was objected to another adjudication of *Brown*'s, in the year 1703, That, taking the letters and executions of ſpecial charge,

charge, which are not produced as narrated in the decreet of adjudication, it does not appear they were executed againſt the tutors and curators of the apparent heir to the common debtor.

Anſwered: The objection comes now too late after thirty three years, that the adjudication has ſtood unquarrelled, the minor himſelf, as well as tutors, *&c.* were lawfully cited; conſequently, they ought then to have appeared, and objected, if they had any thing to ſay. This they not only omitted, but allowed the adjudication to remain unquarrelled ever ſince the date thereof; after which, the adjudger is not bound to produce the letters of ſpecial charge; ſeeing the law preſumes them eaſily loſt: and therefore, as the decreet bears production of the letters and executions, after ſo long a time, *omnia præſumenda ſolemniter acta*; which general preſumption is confirmed in the preſent caſe, when it is conſidered, 1*mo*, That, in marking the production, the deceeet bears executions of ſpecial charge, which, in the proper meaning of the words, ſuppoſes more than one, and there could be none other but the executions againſt the tutors, *&c.* 2*do*, The tutors, *&c.* are cited in the ſummons of adjudication, which is a ſtrong preſumption, that the ſpecial charge would likeways be execute againſt them, as was determined in a parallel caſe; 14th *February* 1706, *Ker* of *Moriſton*.

Replied: The creditors are not inſiſting to have the executions produced, they are willing to hold them to have been of the ſame tenor as narrated in their competitor's right; but they cannot ſuppoſe there were executions, which are no where mentioned in the decreet. The brocard, *omnia præſumuntur*, does not apply; for, tho' an execution, which appears actually to have been done, may be thereby preſumed formal, yet it would be very abſurd to maintain, That, by this maxim, an execution ſhould be preſumed, which does not appear ever to have had a being. As to the argument drawn from the clauſe in the decreet, referring to the letters and executions thereof, it was anſwered, There is nothing more common than to ſpeak of executions, altho' there is but one; ſurely the overly mentioning thereof in a relative clauſe of a decreet, does not prove that a party was called, who is not once ſaid to be called thro' the whole of it. The fact being then fixed, That the ſpecial charge was not execute againſt the tutors, the effect muſt be the ſame, as if it had not been executed at all; for an execution againſt a minor is good for nothing, if his tutors are not cited; as, in that caſe, he cannot deliberate whether to enter or not; of courſe, a decreet, which is liable to ſuch defects muſt be null and void.

The Lords found the objection, That it does not appear the ſaid letters were execute againſt the tutors and curators, but only againſt the minor, not relevant to reduce the adjudication in totum, *but only to reſtrict the ſame to a ſecurity for principal ſum, annualrents and neceſſary expences.*

N° LXX.

N° LXX. *Eodem Die.*

Competition, *James Grant, &c.* with *Robert Sutherland.*

Competition amongſt executors-creditors.

William Shaw drover having died in *England*, his ſon *Robert* intromitted with his effects; and, in the year 1728, he gave in a petition to the Commiſſary of *Inverneſs*, acknowledging, That, after all deductions, there was *L.* 240 *Sterling* of his father's money ſtill in his hands; on which the Commiſſary decerned him executor to his father. After this, he died, before any confirmation was expede; whereupon the ſaid *James Grant, &c.* being creditors of *William Shaw*, applied to have *Robert*'s repoſitories ſearched, that ſo the money, which he owned belonged to his father, might be ſecured for their behoof; but upon a ſearch being made, there was only found *L.* 126; ſo that there was wanting *L.* 114.

As this was the fact, *James Grant, &c.* imagining that *Robert*'s intromiſſion with his father's effects, made him liable to them to the extent thereof, applied to the Commiſſaries to be decerned executors, *qua* creditors to him; who accordingly decerned them executors, with licence to purſue.

Upon this, *Grant* brought a proceſs againſt *John Mackay*, who was debtor to *Robert Shaw*, in *L.* 114. which was the preciſe ſum wanting of the caſh, that *Robert* had acknowledged to be in his cuſtody belonging to his father.

Robert Sutherland being alſo creditor both to *William* and *Robert Shaws*, was upon a decreet he had obtained againſt *Robert*, confirmed *anno* 1734, by the ſame Commiſſary executor-creditor to him in the ſum due by *Mackay* to *Robert*; and, upon this title, he compeared in the above proceſs, and craved to be preferred.

The grounds upon which *Grant, &c.* founded their preference were their being decerned executors-creditors to *Robert*, as early as the 1728, with a licence to purſue; and, upon that title, having brought this action, they ought to be preferred to *Sutherland*, whoſe confirmation is dated only in the year 1734, which could not regularly have been granted to their prejudice, who were decerned executors ſo long before, without being called to that ſecond confirmation.

Anſwered for *Sutherland:* When he confirmed the ſubject in diſpute, all the creditors of *Robert* were then called edictally, as the law requires; conſequently, ſo were his competitors, if they are creditors of *Robert*'s, which, it was contended, they were not.

2*do*, Granting they were creditors to *Robert*, he knows no law to hinder him to confirm any ſubject of his debtor's not yet confirmed; as he takes it for a principle, That, after the lapſe of ſix months from the debtor's death, it is confirmation only, and not a licence to purſue, that gives the preference. 3*tio*, His competitors have no proper right in their perſon, whereon they could be decerned executors-creditors to *Robert*; becauſe they were not creditors to him, but to *William* his father; of courſe, they

they could no more confirm themſelves executors-creditors to *Robert* than they could have confirmed themſelves executors to any debtor of the father's; without previouſly conſtituting the debt againſt ſuch debtor's repreſentatives: therefore, he ſhould be preferred, as being the only proper creditor of *Robert*'s, who has made up a compleat title to the ſum in queſtion.

Replied: Tho' it may be true, That, if a perſon decerned executor with a licence, does not proſecute his right, the Commiſſary may confirm another; yet this cannot be done, until the perſon firſt decerned be called; becauſe a right is not to be taken away, *parte inaudita*. And as to the alledgeance, That the purſuers have no proper right in their perſon, whereon they could be decerned executors to *Robert*, it was anſwered, That they are not bound to enter into the diſpute, whether the Commiſſar did right or wrong in giving them that title; as it ſurely excluded any after-confirmation till it ſhould be altered by the Judge. 2*do*, It is alledged, without ground, the purſuers are not creditors to *Robert*; for altho' it be true, that they were not originally creditors to him, yet they became ſo, by his intromiſſion with his father's effects, whereby he repreſented him *in valorem*. See 26th *December* 1705, *Dickie*. And, as to the ſuppoſition, The purſuers could no more confirm to *Robert* than they could to a debtor of the father's, it has no affinity with the preſent queſtion; ſeeing the difference lies here, that a debtor to the father is not debtor to his creditors: but, in the preſent caſe, *Robert*, by his intromitting with his father's effects, and diſpoſing upon part thereof, thereby repreſented him, and ſo *in tantum*, became debtor to his creditors.

The Lords preferred Robert Sutherland.

N° LXXI. *July* 26. 1737.

James Meikle, contra *John Tennent*.

Quality, in a Declaration, whether intrinſic or extrinſic.

THE purſuer, as having right from *Richard Meikle*'s executor, brought a proceſs againſt the defender for payment of 300 merks, which he had borrowed from *Richard*; and, as no written document had been given for the money, the purſuer inſiſted, That *Tennent* ſhould confeſs or deny whether or not he had borrowed that ſum from *Richard Meikle*.

The defender *anſwered:* He denied he ever borrowed or received that money from the deceas'd *Richard Meikle*, but on the expreſs condition of repaying the ſame, only in caſe he ſhould aſk it in his own lifetime, and not otherwiſe, which was the reaſon why he required neither bill nor bond for the ſame.

The Lords found the quality in the declaration intrinſic.

N° LXXII. *Eodem Die.*

Annuitants of the *York* Building-Company, *contra* Sir *Archibald Grant*, &c.

Import of a Clauſe in a Tack to pay the Tack-duty free of certain Burdens, particularly therein ſpecified, and all other Deductions whatſomever.

BY a tack, which the ſaid Company ſet to Sir *Archibald*, *&c.* the leaſees were bound to pay to the Governour and Company a yearly tack-duty, of *L.* 4000 *Sterling*, " free of ceſſes, miniſters ſtipends, poor's money, " and all other public burdens, and other deductions whatſomever, im- " poſed, or to be impoſed, *&c.*"

The tackſmen having paid certain feu-duties and ground-annuals, payable out of the eſtates that fell under the leaſe, this queſtion occurred, Whether, notwithſtanding the above clauſe, they could have allowance thereof out of their rent.

For Sir *Archibald*, it was *pled:* That the words in the tack *other deductions*, muſt be underſtood of ſuch deductions only as are of the nature of ceſſes, miniſters and ſchool-maſters ſtipends, *&c.* ſpecified in the preceeding part of the clauſe; *i. e.* of ſuch caſual burdens as from time to time might be charged upon the eſtates, and not of feu-duties or ground-annuals, which are conſtant and certain, and are rather a reſerved rent to the ſuperiour, than burdens upon the remaining rent belonging to the vaſſal, in conſequence of his property; which conſtruction of the clauſe is further confirmed by the words *impoſed or to be impoſed*, immediately ſubſequent to *public burdens, and other deductions whatſomever*, as it could not, with any propriety, be ſaid, that feu-duties are a burden impoſed: nay, if a contrary conſtruction were to take place, it might be pretended, that even payments, made to creditors of the ſetter, who had infeftments of annuity or annualrent on the lands, ought not to be allowed as part of the tack-duty; becauſe the tackſmen are bound to pay it, without any deduction, which would be too groſs to maintain; and, altho' payment to the creditors of the ſetter may be ſaid to be the ſame as payment to himſelf; yet, it is alſo true, that all payments, made to thoſe who have a right to claim them out of the lands, are equal to payments made to the ſetter.

Anſwered for the Annuitants (who had come in place of the Company:) The words of the clauſe are obvious, as well as the intention and meaning of the parties, to wit, That the neat tack-duty agreed upon ſhould be paid into the Company, without retaining any part of it, upon account of public burdens, or any other deduction whatſomever; therefore they are not bound to take notice what may be the cauſe or occaſion why the tackſmen pretend to this deduction; by the acceptance of the tack, they have renounced all ſuch deductions as might any ways ſtop or hinder the payment of the tack-duty. 2*do*, It is not ſo obvious, for what reaſon the tackſmen ſhould limit the import of the word *deductions*, to be no other but ſuch as are of the nature of thoſe in the preceeding clauſe; if ſuch had been the meaning, it had been ſufficient, that the clauſe bore *ceſſes, miniſters and ſchool-maſters ſtipends, poor's money, and all other public burdens*;

dens; but there is added, *and all other deductions whatſomever*, to ſhow that ſomething more was intended than ſuch caſual burdens, and to theſe burdens particularly ſpecified, the words *impoſed or to be impoſed* may properly be referred; tho' were it neceſſary, theſe words ſhould be applicable to other deductions, as they are not, a feu-duty, conſtituted before the tack, might well be ſaid to be impoſed, and to affect the rents as much as miniſters ſtipends, *&c.*; more eſpecially, conſidering the tackſmen behoved to know ſome preſtation was due to the ſuperiour, and that the lands might be ſubjected to ſervitudes of multures and paſturage, which could no more properly be ſaid to be impoſed than a feu-duty; but, upon account whereof, it is certain, there could be no claim for deductions, as the tack ſtands.

The Lords found, That the clauſe, and other deductions whatſomever, &c. *does not preclude the tackſmen from being allowed the payments made by them of feu-duties, and ground-annuals, in their articles of diſcharge.*

N° LXXIII. *Eodem Die.*

Alexander Ferguſon, contra *William Ferguſon* of *Auchinblain.*

A Liferenter by Reſervation, is intitled to cut ſylvæ cæduæ, *acccording to the Cuſtom of the Country where the Woods grow.*

THE ſaid *William Ferguſon*, in his ſon *Alexander*'s contract of marriage, diſponed to him the lands of *Auchinblain*, *with the woods and hail pertinents, reſerving his own liferent of the premiſſes*.. Upon theſe lands were two ſmall woods, which *Auchinblain*, imagining he had a right to diſpoſe of (in virtue of his reſerved liferent) ſold one of them that was ready for cutting; in order to ſtop which, *Alexander* brought a declarator to have it found, That his father had no title thereto. And the arguments urged in ſupport of this action, were, That, tho' the woods in queſtion are what the law calls *ſylvæ cæduæ*, yet the defender had no right to the wood itſelf, but only, in caſe it was cut by the purſuer, the liferenter might have the uſeleſs ſhoots that muſt be cut off, in order to its growing in due courſe; agreeable to *L.* 10. *De uſu fruct.* and the act 25. *p.* 1491, ratified by the 15th act, *p.* 1535. Whereby it is "provided, that life-"renters ſhall find caution that they ſhall not waſte or deſtroy woods, *&c.* "but that they hold them in ſick-like kind as they are at the time they "receive the ſame, taking their reaſonable ſuſtentation, or uſing in need-"full things, without deſtruction or waſting thereof." See Sir *George Mackenzie* upon this act, and *Craig*, *lib.* 2. *dieg.* 8. § 17.

For the defender, it was *argued:* That, as he had reſerved the liferent of the ſubjects diſponed, it followed, That the liferent behoved to be as comprehenſive as the fee; of courſe, it included the woods; and, tho' his right was only temporary, yet, during the continuance thereof, the uſe of the ſubjects were as fully in him as the purſuer; with this reſtriction indeed, that he muſt ſtill uſe the ſame, *ſalva ſubſtantia*. Nor does this militate

tate againſt the doctrine now pled for; ſeeing the defender does not pretend to deſtroy the ſubjects liferented, but ſoly to have the uſe of them, in the like manner as was accuſtomed to be done formerly; and, if it can be made appear, that the timber of a wood falls under the deſcription of *fructus*, it ſeems neceſſarly to follow, that the liferenter has a right to cut the ſame.

Upon this queſtion, the civilians diſtinguiſh betwixt *ſylvæ cæduæ*, and *non cæduæ*, the laſt of which the defender admits, does not belong to a liferenter; but, as to the former, which are deſigned for cutting, and which are regularly cut in a certain number of years, which is the caſe with the woods in queſtion, it is believed, that, ſince the *fructus* of theſe conſiſts in nothing but the timber got out of them by cutting, and that, notwithſtanding thereof, the wood remains, juſt as much as a meadow after it is mown is ſtill a meadow; that therefore the right to cut ſuch woods belongs to the liferenter, conform to *L.* 9. § *ult. De uſu fruct. &c.* Neither is the words of the act, quotted for the purſuer, contrary to this doctrine; as the meaning thereof is *tantamount*, as if it had ſaid, he uſing the ſame *tanquam bonus paterfamilias*: and moſt certainly it is the part of every prudent man to cut his woods, when they come to maturity, which is putting them to a reaſonable uſe, and a preſervation inſtead of waſte. It is true, That this right has been found not to be competent to liferenters by conſtitution, but that is no objection againſt the defender; ſeeing a liferent, by reſervation, ſuch as the preſent, has many priviledges attending it that the other has not; a liferent, by conſtitution, being conſidered as intended only for an *annuus reditus*; and therefore is ſtrictly interpreted, ſo as to take nothing but what falls within the deſcription thereof. But, with reſpect to the other, it is more favourably conſtructed; as a liferenter, by reſervation, does not derive his right from the fiar, but the fiar from him; of courſe, it is interpreted extenſively, *viz.* to be as broad as the fee.

Anſwered for the purſuer: That a conjunct fiar, whoſe right reſolves into a liferent, has as ſtrong an intereſt in the ſubject as a liferenter, by reſervation; and yet the liferent, by conjunct fee, does not give an intereſt to cut the woods. See *Craig, lib.* 2. *dieg.* 22. § 21. and Lord *Stair*, *p.* 276. who puts both on the ſame footing; therefore, what holds in the one, muſt likeways take place in the other. Beſides, our law has proceeded on the ſuppoſition, That woods, in the ſame manner as coals, are *pars fundi*; and that the liferenters, of whatever kind, can no more cut the growing wood, or make uſe of the coal for ſale, than they could deſtroy the ſurface of the ground, which might render it uſeleſs for many years.

The Lords found, That a liferenter, tho' by reſervation, has not a right to cut woods.

But, upon petition and anſwers,

They found, That Auchinblain, *who is liferenter, by reſervation, has a right to cut the woods in queſtion, according to the cuſtom and uſage of the country where the woods are.*

N° LXXIV.

N° LXXIV. *July* 27. 1737.

Competition, Mr. *Hugh Murray* Advocate, with Mrs. *Elizabeth Rochead.*

A general Diſpoſition to Truſtees, with a Clauſe ſecluding the neareſt of Kin from being Executors, makes the Truſtees preferable to them in the Office of Executry.

THE deceas'd Sir *James Rochead*, by a deathbed-deed, diſponed all his heretable and moveable eſtate to certain truſtees, whereof the ſaid Mr. *Hugh Murray* was one, for the uſe and behoof of the perſons therein named; and, by it, he excluded his neareſt of kin from being executors to him, and from all pretence of managing his means and eſtate, or meddling therewith any manner of way.

Upon this title, Mr. *Murray*, the only accepting truſtee, in order to compleat his right to the moveable ſubjects, moved an edict before the Commiſſaries of *Edinburgh*; in which he was oppoſed by Mrs. *Rochead*, one of the defunct's neareſt of kin.

For Mr. *Murray*, it was contended: That, as the will of the deceas'd is the ſovereign rule in the diſpoſal and management of his effects, it was plain, in this caſe, the appointment of truſtees is upon the matter the ſame as a nomination of executors, they being nothing elſe but truſtees for the behoof of all parties concerned. The buſineſs of executors, in executing a teſtament, is to call for the debts and effects, and to apply the ſame in payment of debts, *&c:* all which powers are, by this deed, committed to the truſtees, ſo that there is nothing belonging to the office of executry which is not granted to them; wherefore there is here a virtual nomination; and words are not to be regarded, when the thing itſelf is plain: but the matter does not reſt upon this footing allenarly, there is likeways a prohibition, or exheredation of all the neareſt of kin. It is true, a ſimple exheredation would not avail; becauſe a right, that is not made over to another, muſt ſtill deſcend, as the law directs, notwithſtanding the ſtrongeſt excluſion to the contrary: but, at the ſame time, the prohibition here ſerves to explain the will of the defunct, and makes the whole that the law could have intended for ſuch neareſt of kin, to centre upon the perſons indirectly named; and conſequently, the truſtees, to whom the ſubjects are conveyed, muſt be underſtood likeways to be called to the office of executry, when the neareſt of kin are, with the ſame breath, excluded. See the caſe betwixt *William Oliphant*'s relict, and his neareſt of kin, referred to in the deciſion, 27th *January* 1708, *Scot* of *Harden*.

It was *argued* for Mrs *Rochead:* That, by the genius of our law, excluſion or exheredation of the neareſt heir, whether in heretables or moveables, avails nothing, unleſs there be an expreſs inſtitution or nomination of another heir; and that the neareſt of kin has a right to the office, even where the executry is exhauſted by debts, legacies, or a general diſpoſition; a doctrine which ought with greater reaſon to take place here, as Mrs. *Rochead* has intented a reduction of the general diſpoſition.

2do, The uniform practice of the Commiſſaries is, to prefer the neareſt of kin to general diſponees; a procedure founded on the expreſs terms of their inſtructions, *anno* 1666; which contains, *inter alia*, this inſtruction: " if there be no nomination or teſtament made by the defunct, or, if the " teſtament-teſtamentar ſhall not be deſired to be confirmed, ye ſhall con- " firm the neareſt of kin deſiring to be confirmed; and, if the neareſt of " kin ſhall not deſire to be confirmed, ye ſhall confirm ſuch of the cre- " ditors as deſire to be confirmed as creditors, they inſtructing their " debts."

Now, ſo it is, a general diſponee cannot otherways be confirmed than as executor-creditor, having no pretenſion, either to be executor-nominate, or neareſt of kin; for theſe two things, the office and the benefit are perfectly diſtinct, each of them requiring proper and apt words to convey the ſame; and therefore, if a ſtranger be executor-nominate, unleſs he be alſo named univerſal legator, he gets nothing but a naked office, with ſuch benefit as the law has ſuperadded thereto; and, *vice verſa*, if a ſtranger get an univerſal diſpoſition to the moveables, he has thereby no title to the office of executor, otherways than by a fiction, as *quaſi* creditor, in caſe there be neither an executor-nominate or neareſt of kin competing with him; agreeable to which principles, it was determined, in the foreſaid deciſion, *Scot* of *Harden*. Nor does the clauſe, ſecluding the neareſt of kin, vary the argument; as our law knows no ſuch thing as a virtual nomination or inſtitution of heirs, whether in heretage or moveables.

Anſwered for Mr. *Murray:* The inſtructions to the Commiſſaries do not touch the point; becauſe, where there is a general diſponee, eſpecially with an excluſion of the neareſt of kin from the office, there is a virtual nomination in the caſe; and conſequently, he is preferable to the neareſt of kin, according to the above inſtructions. Beſides, it is plain, from the laſt words thereof, That the creditors mentioned therein, who are poſtponed to the neareſt of kin, are only creditors in particular ſums, and not a general diſponee, who has a right to all the effects of the defunct.

The Lords remitted to the Commiſſaries, with this inſtruction, That they prefer the truſtee to the office of executry, but prejudice to the neareſt of kin to propone objections, &c.

N° LXXV. *November* 18. 1737.

Macbrair of *Netherwood*, contra *John Robertſon* and *James Vere*.

A Purſuer cannot recur to the Defender's Oath, after having made his Election, and examined Witneſſes.

Netherwood brought a proceſs againſt *Robertſon*, *&c.* on ſeveral acts of Parliament for fiſhing in forbidden times, which he offered to prove by their oaths.

To this it was *objected:* That the acts being penal, they could not be obliged to depone.

Anſwered

Anſwered for the purſuer: That theſe ſtatutes were only penal, as to the third attachment or crime; but, that this being the firſt, he reſtricted his action to the pecuniary mulcts and damages therein enacted for the firſt fault. With this debate, *aviſandum* was made; after which, *Netherwood* offered to prove his libel, *prout de jure*: whereupon, before anſwer, an act and commiſſion was granted; in conſequence whereof, ſeveral witneſſes were adduced; but, upon finding the proof not ſufficient, the purſuer thereafter referred his libel to the defender's oaths. To which they objected, That the ſame was not now competent; ſeeing, by the extracted act, the purſuer had betaken himſelf to a proof by witneſſes, and accordingly had led the ſame; which muſt hold more particularly in this caſe, as the reference to oath at firſt was ſtrongly oppoſed, and *aviſandum* made with the debate thereon.

Anſwered: The probation *prout de jure*, being before anſwer, and including all manner of probation the purſuer thought fit to make uſe of, can no ways debar him from the defender's oaths.

The Lords found, That the purſuer having made his election, and examined witneſſes, he cannot now recur to the oath of the party.

N° LXXVI. *Eodem Die.*

Mary Boſwal, contra *David Boſwal.*

1. *Relicts Aliment to the next Term, by what Rule is it to be proportioned, where there was a conventional one granted by the Huſband during the Marriage?* 2. *If ſhe is provided to a Share of the Moveables, are Heirſhip-Moveables to be deduced?*

BY contract of marriage, betwixt *Andrew Boſwal* and the ſaid *Mary*, he provided her in the equal half of his eſtate, which was, in whole, about 1200 merks a year; as alſo to the manſion-houſe, yards, *&c.* which ſhe accepted, " in full ſatisfaction of all terce of land, third part " of moveables, and others whatſomever, that may befal to her, be and " thro' her huſband's deceaſe, in caſe ſhe ſurvive and outlive him, except " her abulizements, ornaments, and third part of the moveables of their " houſe, for the time, which are hereby diſponed to her *&c.*"

Some years before the diſſolution of the marriage, *Andrew* ſeparated from his wife, and gave her an aliment of 200 merks yearly; who, upon her huſband's deceaſe in *February* 1736, inſiſted againſt his heir for an aliment to the next term, which, ſhe contended, ſhould be proportioned according to the liferent provided to her by the contract. 2*dly*, She claimed the third ſhare of the moveables, including the heirſhip.

Pled for the heir, to the *firſt*: That the rule of modifying the aliment ought not to be what the purſuer is to have of liferent in her widowity, but what ſhe had from her huſband during the marriage; for that the time of alimenting, from the huſband's death to the firſt term after, is conſidered to be the ſame as alimenting in his family; conſequently, the aliment ought to be ſuitable to what was then allowed her: *e. g.* If ſhe had been married to a man of a great eſtate, and had only been provided

to

to a ſmall liferent, the modification of her aliment would have been ſuitable to what ſhe would have had while in her huſband's family; and, by the ſame rule, it ought to be leſſened, when her huſband's circumſtances were ſuch as made him uncapable to give her an aliment ſuitable to the extent of her liferent: or, ſuppoſe the caſe, which many times falls out, that a huſband has but a ſmall free eſtate, and that his widow, by his death, comes to a liferent much more in value than the yearly free rent he had to live upon, it would not be reaſonable ſhe ſhould have an aliment ſuitable to her huſband's circumſtances in her widowity: ſo that the rule ought to take place here, *ſurrogatum ſapit, &c.*; more eſpecially, as the defender has nothing to maintain himſelf out of the eſtate, the annual-rents of the debts thereon being more than exhauſts the full half of the rents.

To the *ſecond*, it was *anſwered:* That, in proviſions to wives, it has been always conſidered as a doubtful point, whether heirſhip was underſtood excluded, or included; and therefore it has commonly been in uſe, for removing this doubt, to expreſs in the deed, That heirſhip was included in the proviſion, when it was deſigned that theſe ſhould go to the widow; which not being done in this caſe, creates a preſumption they were not intended to be included; and which ought the more eſpecially to hold here, ſeeing this proviſion is given as a part of the third of the moveables to which ſhe would have had right *jure relictæ*, if ſhe had not been excluded; and ſo the third muſt be underſtood to be of the ſame nature and kind of moveables which ſhe diſcharged.

Replied for the relict: That the aliment allowed her, while ſhe lived ſeparate from her huſband, can be no rule for proportioning the aliment now claimed; becauſe, while he lived, he had himſelf and a ſeparate family to maintain. Beſides, there might be many other reaſons for giving a ſcrimp allowance to his wife during their ſeparation, and which, for peace ſake, ſhe might be willing to accept; but, as that ended as ſoon as the marriage diſſolved, the relict, of courſe, falls to be alimented by the heir to the next term that her liferent commenced, according to her ſtation: for aſcertaining whereof, there can be no better rule than to make it correſpond to the liferent-proviſions to which ſhe is intitled in the event of her ſurviving her huſband. Nor is it any objection, That there are conſiderable debts owing by the defunct; ſeeing the aliment due to the relict, till the firſt term after the huſband's death, is as juſt and onerous a debt as any other: and the eſtate cannot but afford it, ſeeing, by the huſband's death, the expence of him and his ſeparate family ceaſes. And, with reſpect to the heirſhip, That point was ſettled in the caſe betwixt Lady *Kinſawns* and Mrs. *Lyon*, 12th *July* 1734. Nor is it of any importance, That the contract does not bear heirſhip included; for, it may as juſtly be argued, That, as it does not bear heirſhip excluded, it was deſigned ſhe ſhould have the third of the houſhold-pleniſhing, as it ſtood at the time of the huſband's deceaſe. And, it is a miſtake to ſay, That the proviſion is given as a part of the third of moveables, to which ſhe would have had right *jure relictæ*; for ſhe gets not a ſhare thereof, but, in place of it, and other proviſions that would have fallen to her by law, a particular jointure, and a ſhare of a particular ſpecies only of moveables; namely, the houſhold-pleniſhing, as it ſhould be at the time of her huſband's death, which ſhe muſt have, as it ſtands; becauſe, in conſideration thereof,

of, and her jointure, ſhe renounces all legal proviſions, and all ſhare of any other kind of moveables, whether there were children or not.

The Lords found, That the proportion of the conventional aliment muſt be the rule, unleſs it can be ſhown, That, from the circumſtances of the eſtate, there is place for a larger; and that the purſuer had a right to the third ſhare of the houſhold-pleniſhing, including the heirſhip.

N° LXXVII. *November* 22. 1737.

Sutherland of *Pronſie*, contra Lady *Kinminity*.

In a Reduction of a Note granted for the Price of Goods, upon the Head of Minority, &c.; there is no Neceſſity to prove the Identity, when the Goods are offered back.

Pronſie, when a minor, bought a gold watch from Lady *Kinminity*, for which he granted his note to her, for *L* 25 *Sterling:* in a reduction thereof, upon the head of minority and leſion, it was alledged, he had been greatly impoſed upon in the bargain, as the watch was not worth above one third of the price; and, altho' the purſuer would not have been bound to have reſtored it, in caſe he had given the ſame away for nothing, or been liable in the price, if he had ſold it, and ſquandered the money; yet as he happened to be ſtill poſſeſſed thereof, he offered it back to the defender.

Anſwered for Lady *Kinminity:* It is not every tranſaction of a minor's that is liable to reduction, *enorm leſion* muſt always be joined: *e. g.* If he buys cloaths from a merchant, ſuitable to his rank and quality, he cannot reduce the obligation given for the price, on pretence that he could have got cloaths cheaper elſe where. Now, conſidering the purſuer's rank and opulency, it was no extraordinary thing for him to wear a gold watch; more eſpecially, as it is admitted, That, at the time of the purchaſe, he had in view to make a preſent thereof to a young Lady, whom he was about to marry. And, as to the value, it coſt the defender the ſame money ſhe ſold it for; which is the more probable, as the common rate of theſe things are from *L* 20 to *L.* 25 *Sterling*. Beſides, there is no evidence that the watch now offered is the ſame ſpecific one delivered to the purſuer.

Replied for *Pronſie:* It is contrary to the rules either of law or equity, to load him with a proof that the watch is the ſame he bought from the defender; becauſe ſuch a proof would be inexplicable; ſeeing thoſe, who allow themſelves the liberty of dealing with minors, ſeldom or never call witneſſes to their bargains. Neither does the compariſon, from a minor's purchaſing cloaths of a merchant, apply to the preſent queſtion; for, if a merchant ſhould fraudulently induce a minor to pay 30 ſhillings *per* yard, for cloth not worth 15 ſhillings, there can be no doubt, that he would be intitled to ſet aſide the bargain, on the ſame grounds that this tranſaction ought to be reduced.

The Lords, in reſpect the watch was produced, found no neceſſity that the purſuer prove the identity thereof.

N° LXXVIII. *January* 4. 1738.

John Mackenzie, contra *John Somervell*.

Miſſive, whether obligatory or not.

John Somervell being creditor to *Campbell* of *Carrick*, by bill, indorſed the ſame to *James Lochead*, on this condition, That the indorſee ſhould take his hazard thereof without recourſe. *Lochead*, after this, proteſted the bill; whereupon *Carrick* applied to *Somervell* the indorſer to uſe his intereſt with *Lochead* for a delay; upon which, *Somervell* wrote a letter to him of the following tenor: "Sir, *Carrick* came here this day, who "ſays it is not in his power to pay his bill I indorſed you theſe two "months, having a ſum to pay at *Whitſunday*; and, as he has all the in-"clination you ſhould have the money, if he could raiſe it, I therefore "beg you'll give him a delay for the time he demands, which will oblige "him and me, and ye'll loſe nothing by it; I am, *&c.*" After this, *Lochead* aſſigned this debt to *Mackenzie*, who inſiſted againſt *Somervell*, libelling on the above letter, as importing a cautionary obligement for *Carrick*.

For the defender, it was *urged:* That the import of the miſſive was no more than giving an opinion *Lochead* would eventually loſe nothing by the favour aſked; but could not mean, that he intended to come under an obligation to make up ſuch loſs, if it ſhould happen; which appears from the expreſſion, *and ye'll loſe nothing by it*; for the contraction *ye'll* is made uſe of inſtead of *you will*, but is never uſed as a contraction of *you ſhall*; betwixt which two expreſſions there is a great difference; as the one imports the writer's opinion about what would happen; but the other, *viz. you ſhall*, implies an engagement in the writer to make good the verity of his aſſertion.

For the purſuer, it was *anſwered:* That, from the letter, it was plain, the defender did not interpoſe as a friend or adviſer anent what he thought moſt expedient for the intereſt of the creditor; ſeeing it is at *Carrick*'s deſire he aſked the delay, which was a direct ſtating himſelf a cautioner; and, in conſequence thereof, *Lochead*, who was going on in diligence, when he received the miſſive, forbore for upwards of two months. It is true, That a mandate, granted only for the ſake of the mandante, infers no obligation; but a mandate, on account of a third party, which is the preſent caſe, does oblige the mandant to repair any loſs the mandator ſhall incur by following thereof. Beſides, it would have been ridiculous to aſk of *Lochead* to ſuffer the effects of his debtor, *viz.* the ſum that *Carrick* was to pay away at *Whitſunday* to be withdrawn, and to relinquiſh the method pointed out to him by law for attaching thereof, unleſs ſome other ſecurity was to be ſubſtituted in the place of what he paſſed from. And,

as

as to the obſervation on the letter, it is believed, the word *ye'll* has the very ſame meaning, in *Scots*, that *you ſhall*, hath in *Engliſh*.

The Lords found, That the letter implied an obligation on the defender to relieve Lochead *of all damages he might ſuſtain in delaying diligence againſt* Carrick; *but found, That he has the benefit of* Carrick's *being firſt diſcuſſed.*

N° LXXIX. *January* 6. 1738.

Alexander Watſon of *Glentarky*, contra *Patrick Davidſon.*

A Minor, granting Bond for an illiquid Debt, will be reſtored againſt the ſame, if he had a Defence that would have liberated him from Payment, tho' it was founded on an illiquid Claim.

Watſon of *Glentarky* ſettled his eſtate upon *Margaret Watſon* his only daughter; whom failling, to the ſaid *Alexander Watſon*, ſecond ſon to *Watſon* of *Aithernie*; he likeways nominated *Aithernie*, and *Jean Watſon* his ſpouſe, *&c.* to be tutors to his daughter. After his deceaſe, the tutors took upon them the adminiſtration of the pupil's affairs; during which, the ſaid *Jean Watſon* intromitted with ſeveral moveable ſubjects belonging to her daughter, extending to above 4000 merks; and afterwards ſhe married Provoſt *Davidſon* in *Perth*, in whoſe houſe the pupil ſtayed for about nine years, and then died: whereupon Provoſt *Davidſon* applied to *Aithernie* for payment of *Margaret Watſon*'s aliment, while ſhe lived with him; and he, as tutor to his ſon, who ſucceeded to the eſtate of *Glentarky*, in virtue of the above ſettlement, granted a bond of 4000 merks for the aliment, which bond the ſaid *Alexander Watſon* corroborated in his minority: but, ſo ſoon as he came to be major, he intented a reduction thereof, upon the head of minority and leſion, inſiſting chiefly on this ground, That no bond ought to have been given to Provoſt *Davidſon*; ſeeing his claim for the aliment might have been ſet aſide by compenſation, in ſo far as his Lady was debtor to the minor in a ſum exceeding the value of the aliment, and that he was liable for her intromiſſions.

Anſwered for the defender: The bond was granted for a moſt juſt and onerous debt, and to which the purſuer, as heir to *Margaret Watſon* his predeceſſor, would have been liable; conſequently, he was not leaſed, by granting a ſecurity for the ſame. And, with reſpect to the reaſon of reduction inſiſted on, it was obſerved, That there was no ground of compenſation competent either to the purſuer, as heir to *Margaret Watſon*, or to her executor, on account of the Provoſt's Lady's intromiſſion; ſeeing the ſame was not liquid, and afforded only a ground for intenting an action of compt and reckoning againſt the Provoſt's Lady, which could not affect or make him debtor therein, until the debt was conſtituted againſt him. Neither has any action been hitherto brought for that purpoſe; of courſe, the omiſſion to propone this no compenſation, is no leſion at all.

Replied: The leſion here is obvious; ſeeing the purſuer had a clear and relevant objection againſt granting theſe bonds, in ſo far as the aliment might

might and ought to have been ſatisfied by the ſums due by the tutrix and her huſband, as liable for her debts; and, in all ſuch queſtions as the preſent, the only thing inquired into, is, if the minor be leſed; not what was the condition of the other party: yea, even where the agreement is never ſo fair on the other ſide, if the minor be leſed, ſuch tranſaction muſt be ſet aſide, in ſo far as he is prejudged. Thus, if a minor ſhould *adire hæreditatem damnoſam*, and pay the creditors thereon, there could be no doubt, if he could ſhow he was hurt thereby, but that he would be reſtored againſt the ſame, however juſt the creditor's debts, to whom the payments were made; ſo, in the preſent caſe, however juſt the claim of aliment, if the minor had a good defence, which would liberate him from payment, he ought to be reſtored againſt any ſecurity therefore, which cut off his objection to it.

The Lords ſuſtained the reaſon of reduction upon minority and leſion, reſerving to Provoſt Davidſon *to inſiſt againſt the heir or executor for the aliment as accords.*

N° LXXX. *January* 10. 1738.

Macleod of *Cadboll*, contra *William Sinclair* Sadler in *Edinburgh.*

Action for annulling Indentures, and Repetition of the Apprentice-Fee, upon the Act 8*vo Annæ.*

Cadbol bound *David Roſs* an apprentice to the ſaid *William Sinclair*, paid *L.* 25 of apprentice-fee with him, and likeways became cautioner in the indenture; of which, (upon *Roſs*'s deſerting his maſter's ſervice,) *Cadbol* brought a reduction on the act *octavo Annæ*, intitled an act for laying certain duties on candle, *&c.* ſpecifying, That, over and above the apprentice-fee, the defender covenanted the additional ſum of a guinea to be paid to his wife, which accordingly was paid ſome time thereafter, and which not being inſerted in the indentures, inferred a forfeiture of double the apprentice-fee, beſides voiding the indentures: however, the purſuer did not inſiſt on the penalty, but reſtricted his action to the nullity and repetition of the money paid.

For the defender, it was *pled:* That the penalty, in the act, upon the receivers of any ſums not contained in the indenture, is only a forfeiture of the double of ſuch ſums received; the one half to the Crown, the other to the informer. 2*do*, The guinea does not fall within the ſtatute, it being no part of the apprentice-fee, directly or indirectly, but was given as a compliment to his wife, half a year after the date of the indentures, for taking care of the young man, who was kept at bed and board in the family; and, if ſuch gratuity is conſtructed to fall within the act, it would

would reduce moſt part of the indentures in *Scotland*, this being the known cuſtom with reſpect to all houſe-apprentices.

The Lords found, That the forfeiture by the ſtatute is only double the ſum received by the defender's wife; and that the ſame is recoverable only in the Court of Exchequer; and therefore repelled the reaſon of reduction founded thereon; but found the indentures could yield no action, and that there is no repetition of the ſum in theſe indentures competent to the purſuer.

N° LXXXI. *January* 11. 1738.

Henrietta Carruthers, Relict of *Andrew Barclay*, contra *Andrew Barclay* Merchant in *Edinburgh*.

The Annualrents which fall due the firſt Term after a Huſband's Deceaſe, upon an heretable Bond, provided to him and his Wife in conjunct Fee and Liferent, and the longeſt Liver, belong to her, and not to the Executor.

THE deceas'd *Andrew Barclay*, writer in *Edinburgh*, having acquired right to two heretable bonds, upon which infeftment had followed, provided the ſame to himſelf and the ſaid *Henrietta Carruthers* his wife, and longeſt liver of them two, in conjunct fee and liferent, for her liferent-uſe allenarly. *Andrew* died on the 17th *Auguſt* 1735; after which, his relict brought a proceſs againſt *Andrew Barclay* his executor, for repetition of the annualrents that had ariſen upon the ſaid bonds, betwixt the *Whitſunday* and *Martinmaſs* 1735, and which he had intromitted with, upon the ſuppoſition they belonged to him.

The arguments urged for the defender were: That our law, as well as that of the *Romans*, diſtinguiſhed betwixt *fructus naturales*, or *induſtriales*, and *fructus civiles*, with reſpect to the intereſt of liferenters in theſe different ſubjects; and that, with regard to the laſt of theſe, as they yielded an utility every day, they ought to fall, from day to day, to the liferenter or fiar, according as the liferent ſubſiſts, or the intereſt of the fiar takes place. See Lord *Stair*, *tit. Liferent-Infeftment*, § 9. and *Voet. Comment. tit. De uſu fruct.* and *Quomad. &c.* § 30. It is true, our practice has varied from the rules of the *Roman* law, that govern the deciſion of *fructus induſtriales*, and divided the intereſts of liferenters and fiars in theſe ſubjects, by the fixt terms of *Whitſunday* and *Martinmaſs*, in order to avoid a variety of intricate and doubtful queſtions that occurred amongſt them, thereby extending the intereſts of liferenters, who die after *Whitſunday*, and before the crop be reaped, to the half beyond what the ſubject liferented would have naturally yielded, and contracting the intereſt of liferenters who die after the crop is reaped, and before the term of *Martinmaſs*. But, as to the *fructus civiles*, ſuch as houſe-rents, annualrents of money, *&c.* which yield their utilities equally every day, there can be no place for any ſuch doubtful queſtions; therefore, there is no colour from public utility, for departing from the *Roman* law, as to the diviſion of *fructus civiles*, between liferenters and fiars, or betwixt the executors of the deceas'd and ſurviving conjunct fiar.

Anſwered for the purſuer: That, where an annualrent, whether in money or victual, is payable out of lands at two terms in the year only, the term that the creditor ſurvives falls to the executors, in the ſame manner as in the caſe of rents. See *January* 12. 1681, *Trotter*. Without diſtinguiſhing whether the annuity or annualrent be redeemable or irredeemable, or whether it be an infeftment of annualrent ſubjoined to a perſonal bond, as in this caſe, or an infeftment of annualrent conſtitute by itſelf, redeemable, or ſubject to requiſition at the ſuit of the creditor: for, where an infeftment of annualrent is granted in ſecurity of the perſonal obligement, this laſt is ſunk in the annualrent, till the creditor recurs to the perſonal obligement, by charging for payment; but, when the creditor dies before requiſition or charge is uſed, the infeftment of annualrent is ſoly conſidered, and only the bygone terms belong to the executors, without any partition, with reſpect to which, *dies nec venit nec cædit*. As to the principles of the civil law, they no ways apply; ſeeing the *uſufruct*. or liferent of money with them was execute, by delivering to the liferenter the money, that he might uſe it during his life; and he, for the ſecurity of the fiar, found caution to return the like ſum at his death. It is true, the liferenter of the *operæ ſervorum* reſembled, in ſome meaſure, the liferent of perſonal bonds with us, and was due *de die in diem*: but that can afford no argument in the preſent caſe; for, in perſonal bonds, the annualrent is purely accceſſory, and becomes due day by day; and conſequently, what was paſt of it muſt fall under the executry, as the principal ſum itſelf does: but this rule cannot hold in infeftments of annualrent, payable at two terms of the year; for there the fiar himſelf could not uplift a broken term, or ſue execution for the ſame, he could indeed charge for the whole ſum, whereby the infeftment of annualrent would be looſed: but, even in that caſe, a broken term would not come under queſtion, the creditor being always obliged to charge, ſome days preceeding the term, to take effect thereat. And, tho' the creditor had liberty to charge upon a bond ſecured by infeftment of annualrent betwixt terms, yet that could not have any influence here, as the annualrent remained fixt and unlooſed at the fiar's death.

The Lords found, That the ſum purſued for being heretably conceived in favours of the huſband and wife in conjunct fee and liferent, and for the wife's liferent, in caſe ſhe ſurvived the huſband, and which is payable at two terms, Whitſunday *and* Martinmaſs, *by equal portions; therefore the half year's rent, which fell due at* Martinmaſs *after the huſband's death, does belong to his relict, and not to his executor.*

N° LXXXII.

N° LXXXII. *January* 31. 1738.

The Earl of *Sutherland*, contra Mr. *David Coupar* Writer in *Edinburgh*.

A Superior, in a Proceſs of Recognition, is intitled to have the writs relative thereto exhibited to him, without paying the agent's Accompt, who has the Cuſtody thereof.

IN the proceſs of recognition at the Earl's inſtance, as ſuperior of the lands of *Skelbo*, belonging to the Lord *Duffus*, Mr. *Coupar* being charged, in virtue of letters of diligence, to exhibit ſeveral writs that were in his cuſtody; which, it was alledged, might be probative of the points admitted to the purſuer's probation, did, in order to ſtop executing the ſecond diligence, petition the Lords; ſetting forth, That he having been employed by Lord *Duffus* the defender, had depurſed ſome money in his affairs; and therefore, having a right of hypotheque in theſe writs, he was not bound to produce them, as the production thereof would be evidence of the facts the Earl was allowed to proof; which, being all that was wanted, would tend to fruſtrate Mr. *Coupar*'s payment.

Anſwered for the Earl: That the accompt due to Mr. *Coupar* is preſcribed; of courſe, the right of hypotheque, which is only acceſſory, cannot ſubſiſt after the debt, for which it is a ſecurity, is extinguiſhed.

2*do*, Suppoſing it were not, the right of retention, in virtue of the hypotheque, cannot take place here; as the Earl is not inſiſting for delivery, but only for exhibition in the Clerk's hands, *ad modum probationis*; which is a piece of juſtice he is intitled to demand from every perſon, in whoſe cuſtody theſe papers may happen to be lodged: Nay, Lord *Duffus* himſelf, if he had had the poſſeſſion thereof, could not have detained them upon any pretence whatſomever; conſequently, Mr. *Coupar*'s title cannot be ſtronger than his author's right of property.

Replied to the *firſt*: An exception by an agent againſt exhibition does not preſcribe, ſo long as the writs are in his cuſtody. And, to the *ſecond*, it was anſwered, That a right of property, and that of an hypotheque, are, in their nature, quite different; the proprietor ſuffers nothing by exhibiting the writs, if he gets them ſafely returned: but a writer, who has the cuſtody thereof, for ſecurity of his accounts, would be precluded from any benefit ariſing from his hypotheque, if he were obliged to exhibit them even *ad modum probationis*; more eſpecially, that, if the purſuer prevail in the proceſs of recognition, there will no ſubject remain for payment of any of Lord *Duffus* his creditors.

The Lords found, That the Earl had a title to have the writs exhibite to him, without being obliged to pay Mr. Coupar's *account.*

N° LXXXIII.

N° LXXXIII. *February* 7. 1738.

George Ochterlony, contra Sir *George Mackenzie*.

1. *A Purſuer may mend his Libel, tho' the Days of Compearance are wrong filled up, if the* induciæ *are elapſed before calling the Cauſe.* 2. *A Decreet of Adjudication is a ſufficient Title to carry on a Sale.*

Ochterlony having raiſed a proceſs of ſale againſt Sir *George*, execute the ſame on the 2d of *November* 1737, warning him to compear upon the days contained in the ſaid ſummons, which were the firſt and laſt of *November*.

Objected, 1*mo*, That the execution was null, ſeeing the firſt diet of compearance ought to have been twenty one days after the date of the execution; whereas here the defender was cited to compear to a day, *de facto*, paſt, when the ſummons was execute, thereby not only abridging him of the common *induciæ*, but likeways commanding him to do an impoſſible thing. 2*do*, The purſuer's title being a naked decreet of adjudication, without either infeftment or charge againſt the ſuperiour, could not, by the act 17. Parliament 1681, intitle him to carry on this proceſs; as that law requires the creditor to have a real right, which an adjudication is not; the ſame being only a legal diſpoſition in ſecurity, which makes a good aſſignation to the maills and duties, but is no real lying upon the land, until it be followed forth by infeftment.

Anſwered to the *firſt*: That the ſummons (as is cuſtomary, where there are ſeveral defenders) was left blank, when it was execute; and, after it was returned, the purſuer's doer, by miſtake, filled up the firſt and laſt days of *November*, inſtead of the 24th of that month, and ſecond of *December* thereafter: but the miſtake could be of no avail; for, as the defender had the full *induciæ* before the cauſe was called, the purſuer ſhould be allowed to mend his libel. And, as to the *ſecond*, it was anſwered, That the term *real right*, in the act, means an adjudication, without either charge or infeftment; as is evident from the words, "Our Sovereign "Lord conſidering, That, when the eſtates and lands of bankrupts are "affected with adjudications, compriſings, and other real rights, *&c.*" Beſides, by the act of Sederunt 23d *November* 1711, it ſeems to be ſuppoſed, That a naked adjudication is a ſufficient title in a proceſs of ſale.

The Lords allowed the purſuer's procurator to amend the libel, with reſpect to the filling up of the days of compearance therein, and repelled the alledgeance againſt the purſuer's title, ſuſtained the libel and active title libelled on, &c.

N° LXXXIV.

N° LXXXV. *February* 9. 1738.

Heritors of the Pariſh of *Selkrig*, contra the Duke of *Roxburgh*.

Reparation of the Kirk is no Burden on the Titular of the Teinds, further than their Valuation.

THESE heritors raiſed a proceſs againſt the Duke, in order to have it found, That he, as titular of the teinds of that pariſh, was bound to repair the third part of the Kirk.

Pled in defence: there was no law which made the titular liable for the reparations of any part of the kirk, that being no burden on the teinds, but on the heritors, conform to their valuations. Indeed, where there is a quire, it hath been found, the parſon is bound to repair it; and, perhaps on the ſame foundation, where there is another titular of the teinds than the parſon, he hath been found liable; but, where there is no quire, as is the caſe here, there is no inſtance known of either the one or the other's being obliged to repair the kirk.

Anſwered: That the proviſion, by our ſtatutes, for burdening the heritors with reparation of churches, particularly, by the 54th act, 3d Parl. *James* VI. is only a ſubſidiary or additional proviſion, but does by no means liberate thoſe who were formerly ſubject by law before the Reformation; ſuch as the parſons who received the rents and revenues of the church, or the profits and emoluments which aroſe therefrom, by bells, burials, maſſes, *&c.* it having been always juſtly held, that the advantages ariſing from the benefit, or church itſelf, ſhould contribute at leaſt to the upholding of the fabrick; conform to which, it was determined in the caſes, the kirk-ſeſſions of *Montroſe*, and the *Cannongate* againſt their reſpective heritors. Beſides, the laſt clauſe of the above act, touching the furniſhing of communion-elements (which is generally underſtood to be in like manner impoſed upon the heritors) is a further evidence of this doctrine; ſince, notwithſtanding thereof, by uniform practice, that burden is alſo laid upon the titulars of the teinds; tho', no doubt, if theſe were exhauſted, the heritors would be liable by the ſtatute; which, tho' it introduces a new remedy, does not aboliſh the old one eſtabliſhed by many authorities in the canon law; as appears from the title of the decretals, *De eccleſiis ædificandis vel reparandis*, *chap.* i. & iv.

Replied: The principles of the canon law can have no influence in this caſe; ſeeing it is no rule with us, in determining either real rights or real burdens; more eſpecially, conſidering that the diſpoſition thereof varied greatly, both with reſpect to teinds, and the reparation of kirks, which was owing to this, That the civil law of the different countries had not paid ſo great a regard to religion as to eſtabliſh any civil rule for repairing of churches; and therefore the Popes, and others, who made the canons, had no other remedy, but to take care of theſe things out of their church-funds, in the beſt way they could. But now theſe matters are on a different footing; the civil conſtitutions of every kingdom having laid down other rules for the determination of ſuch queſtions; and particularly,

our law, as to the reparation of the kirks, ſtands upon the foundation of the acts of Parliament, according to which the defender does not decline to pay proportionally as his teinds are valued in the ceſs-roll. And, with reſpect to the deciſions quotted, they are not in point; ſeeing nothing elſe was determined in either of theſe caſes, but that the produce of the church, ſuch as ſeat-rents, was applicable to the reparation of the church, becauſe to that extent it might repair itſelf; and conſequently, thoſe liable in reparation were only thought to be bound, ſo far as the produce of the church was not ſufficient for the purpoſe; which cannot apply to this queſtion betwixt the heritors and the titular.

The Lords found the Duke of Roxburgh *no further liable than conform to his valuation.*

N° LXXXVI. *February* 10. 1738.

Competition betwixt *Robert Cleland* Kirk-Treaſurer of *Edinburgh*, and Captain *William Crawfurd*.

Import of a Clauſe in a Diſpoſition, aſſigning the Maills and Duties from and after the Terms of Whitſunday *or* Martinmaſs, *after a Liferenter's Deceaſe.*

Thomas Fiſher diſponed certain houſes in *Edinburgh*, under the reſervation of his own and his wife's liferent to *Johnſton* kirk-treaſurer in *Edinburgh*, and his ſucceſſors in office, for behoof of the poor in fee; after the diſpoſitive clauſe, this deed aſſigned the maills and duties of the tenements, in the following words: "And that, after the "firſt term of *Martinmaſs* or *Whitſunday* next after my deceaſe, and the "deceaſe of my ſpouſe, and the longeſt liver of us two allenarly, ſurro-"gating and ſubſtituting them in my full right and place of the pre-"miſſes, under the proviſions above and after mentioned allenarly, and no "otherwiſe, for now and ever; with full power to them to poſſeſs the "ſaid houſes, uplift and diſcharge the maills and duties thereof, after the "deceaſe of me and my ſaid ſpouſe, and the longeſt liver of us two, as "ſaid is, and to do all other things that I might have done before the grant-"ing thereof."

Fiſher having died without any known heirs, his relict obtained a gift of *ultimus hæres*, which ſhe conveyed to Mr. *David Crawfurd* her ſecond huſband: and, in *April* 1736, ſhe died; whereupon a tripartite queſtion aroſe, concerning the half year's rent of the tenements which fell due at the *Whitſunday* thereafter, between the executors of the relict, the donator to the *ultimus hæres* of the huſband, and the kirk-treaſurer fiar of the ſubjects. The intereſt of the relict's executors was put an end to by a reference; but the claims of the other two being litigated, it was argued for the kirk-treaſurer, That, if the diſpoſition had contained no aſſignation to the maills and duties, the right of fee behoved to carry all the rents not falling under the liferents. Nor could the reſtriction in the grant

grant vary the queſtion; for, if that was to have any influence, it behoved to lie in this, That, in ſo far as the donor has not granted the ſaid ſubjects, they are ſtill in him and his heirs, by an implied reſervation: or, 2*do*, in this, That *Fiſher*'s will appears, by the clauſe, to prefer ſome body elſe. As to the *firſt* of theſe; It is true, there is a difference between a conſtituted and a reſerved liferenter; for, in the one caſe, the donor retains every thing he has not given away; but, in the other, the liferenter takes nothing, but by the force of the grant, which does not meet the preſent queſtion; ſeeing *Fiſher* was totally diveſted of the fee, *per verba de præſenti*, retaining the liferent and nothing more; therefore, whatever would fall under the liferent, would be his. But, even ſuppoſing he had ſurvived his wife, and died in *April* 1736, the *Whitſunday* term would not have fallen under even his reſerved liferent; becauſe, as he retained no hold of the property (which is the caſe here, after the determination of the liferent,) the right of fee falls to be extended to all its lawful conſequences, unleſs the intention of the donor appears to the contrary. With regard to which, it is plain, he preferred the diſponee to himſelf in theſe ſubjects; of courſe, to all his heirs, and the King amongſt the reſt, claiming in the character of *ultimus hæres*. 2*dly*, If it does not appear that the donor preferred ſome other perſon, the ſubject in queſtion muſt fall to the diſponee, as a conſequence of his right of property; the excluſion, if there is any, will operate in favours of the perſon preferred; but, if none can appear, and ſhow that he has the benefit of the excluſion, it vaniſhes, and the fee ſtands abſolute.

Argued for the donator: That the deed, in favours of the kirk-treaſurer, being gratuitous, ought to be ſtrictly interpreted, ſo as nothing ſhould be found to pertain to him, but what he can ſhow is conveyed in expreſs and apt words. 2*do*, In the conſtruction of legal deeds, what ought chiefly to be conſidered, is the will and intention of the parties; and, if that come out to be clear; it muſt be obeyed, tho' poſſibly not expreſſed in the moſt proper words. Theſe conſiderations premiſed, it follows, from the nature of the thing, That, when one alienates any ſubject belonging to him, the property muſt remain with himſelf, in ſo far as it is not given away; therefore every reſtriction or limitation upon the fee, in the diſponee's perſon, is *tantamount* to a reſervation of that very fee in the diſponer. In this view, if one ſhall diſpone his eſtate, under this limitation, That the diſponee ſhall have no right to the maills and duties, but from and after a certain term, it will be a miſtake to imagine that the fee is here abſolutely given away from the date of the diſpoſition: the fee, in this ſuppoſed caſe, is limited and qualified in the perſon of the purchaſer, until the term come, at which he has right to the rents; and then, and not till then, it becomes abſolute. In the mean time, the fee ſo far remains with the diſponer, as to intitle him to the moſt uſeful exerciſe of property, which is the rents and profits of the ſubject.

To apply this to the caſe in hand; *Fiſher* diſpones the fee of the tenements in queſtion, reſerving his own and his wife's liferent; but with this expreſs limitation, That the kirk-treaſurer ſhould have no right to the maills and duties, but *frae the firſt term of Whitſunday or Martinmaſs allenarly next after his deceaſe*, &c. Here there is reſerved to the diſponer, not only his liferent-property of the ſubjects in queſtion; but, further, the property

perty after his death, in ſo far as to intitle him to uplift the maills and duties in controverſy.

The Lords found, That the half year's rent, falling due after the life-renter's death at Whitſunday 1736, *did not fall under* Thomas Fiſher's *diſpoſition, but the ſame fell under the gift of* ultimus hæres; *and therefore preferred Captain* Crawfurd *thereto.*

N° LXXXVII. *February* 15. 1738.

James Paterſon Writer in *Stirling*, contra Lady *Houſtoun.*

Miſſive, whether obligatory, or not.

LADY *Houſton* having an intereſt in the pariſh of St. *Ninians*, wrote a letter to Sir *Hugh Paterſon*, impowering him to vote in her name, and ſign a call in favours of Mr. *Mackie* to be miniſter of the ſaid pariſh; and then adds: "Upon doing whereof, and what elſe is neceſſary for me "in that affair, I hereby oblige me to hold as ſufficient, as if I had done "ſo myſelf." The ſettlement having met with oppoſition, ſuch of the heritors who had ſigned the call aſſeſſed themſelves, in order to raiſe a fund for defraying the expences; for payment of a proportion whereof, a proceſs was raiſed againſt Lady *Houſtoun*, founded upon the above letter.

The defence was: That it imported no more than the giving a proxy to vote in the call, which could not ſubject the defender to the expences. And, as to the latter part of the miſſive, it was plainly relative and executive; for, the words, *and what elſe, &c.* could only be underſtood of what was naturally conſequent upon the call's being approved of by the preſbytery; namely, the declaring her ſubmiſſion to Mr. *Mackie* as miniſter of the pariſh, in caſe of a ſettlement: and, as the aſſeſſments were laid on without any authority from the defender, they could not affect her.

Anſwered for the purſuer: That, tho' Lady *Houſtoun* had not added to her proxy the general power of doing all things neceſſary for obtaining the ſettlement, but had only ſigned the call by herſelf or proxy, it is believed, that would have been ſufficient, *per ſe*, to oblige her to pay her proportional ſhare of the neceſſary expence, the joining in ſuch an affair being a tacit entering into a ſociety for that particular, which ſubjects every member thereof to his *quota* of the neceſſary charges; but it was improper to argue the general point here, as the proxy founded on bears expreſsly to do every other thing neceſſary. Now, the only thing requiſite in that affair, beſides the voting for and ſigning a call, was the adjuſting the proportion by which the charges, in obtaining that ſettlement, were to be paid by each individual who concurred therein, and laying the ſame out reaſonably; all which has been done in this caſe.

The Lords found Lady Houſtoun *not liable.*

N° LXXXVIII.

N° LXXXVIII. *February* 17. 1738.

John Rankin Merchant in *Air*, contra *Robert Molliſon* Collector of Exciſe there.

A Perſon ſelling, procuratorio nomine, *is only bound to produce his Commiſſion, if the Goods are not delivered.*

MR. *Arbuthnot* in *Peterhead* having wrote to *Molliſon*, with reſpect to ſome meal he had to diſpoſe of; *Molliſon*, in conſequence thereof, entered into a bargain with *Rankin* anent the purchaſe of the meal, and wrote a letter to him; wherein he ſays, That he had a commiſſion from Mr. *Arbuthnot* to diſpoſe of a certain quantity of meal for his account; and then adds, "And I do agree with you in his name, that betwixt, *&c.* "he ſhall provide you 800 bolls good and ſufficient oat-meal, *&c.* to be "delivered either at *Portſoy* or *Peterhead*, in the option of the ſaid Mr. "*Arbuthnot*, who is to have his orders ready at *Portſoy*, if the ſhip calls "for them." In conſequence of which bargain, *Rankin* ſent a ſhip for the meal; and, upon its not being delivered, he brought a proceſs againſt *Molliſon*, founded upon the above letter, for the damage he ſuſtained by the not delivery.

The defence *pled* for *Molliſon* was: That, by the whole tenor of the letter, it was plain, he did not intend to ſubject himſelf to any perſonal demand at the purſuer's inſtance; as he declares therein, That he acted by commiſſion from Mr. *Arbuthnot*, diſpoſes of the meal for his account, and the place of delivery to be at his option; wherefore, as there are no obligatory words upon the defender, thro' the whole of it, the natural conſtruction muſt be, That *Molliſon* intended only to bind his conſtituent, and not himſelf. See *Huber. tit. Exerc. act.* § 6. *Voet. De Inſt.* § 6. *Sand. Deciſ. book* 3. *tit.* 7. *def.* 1. The import of which authorities amounts to this, That the obligation of the party contracting is to be regulate by the character under which he acts; and that a factor, or perſon acting by commiſſion, is underſtood to bind his conſtituent only, and not himſelf.

Anſwered for the purſuer: Tho' the letter bears the defender had a commiſſion, yet the ſame was not ſhown to him at or before the bargain; he relied ſoly on *Molliſon*, and cannot be ſuppoſed to have acted on the faith of a commiſſion not ſeen, which now it is produced, is indefinite as to quantity, price, and date. 2*do*, Suppoſing the defender had acted *procuratorio nomine*, yet that could not free him; becauſe, as ſuch, he was bound as well as his conſtituent. See *L.* 13. *ff.* §. 25. *De act. empt. L.* 1. § 17. *De exer. act.* 3*tio*, The letter or commiſſion from Mr. *Arbuthnot* to the defender does not give him a power to conclude a bargain with any perſon; and therefore he cannot give a third party a legal action againſt his conſtituent, tho', from his commiſſion, the Court may find the defender has an implied relief.

The Lords found the defender was not perſonally liable, but only to furniſh the purſuer with a commiſſion.

N° LXXXIX. *February* 21. 1738.

Robert Gordon, contra the Magiſtrates of *Edinburgh*.

Act 1696.

IN this caſe, the Lords found, That a perſon liberate upon the act of Grace might be recommitted for a debt contracted poſterior to his liberation.

N° XC. *Eodem Die.*

John Binning, contra *Macdoual* of *Logan* and his Curators.

An Arreſtment need not be ſerved againſt Tutors or Curators.

IN this proceſs of forthcoming, it was *objected* to the arreſtment, That the ſame was void, and could not be the foundation of any diligence following thereon; ſeeing it was only ſerved againſt the minor, and not execute at the market-croſs of the head burgh of the ſhire where he lived, againſt his tutors and curators in general, nor againſt them in particular.

The Lords repelled the objection.

N° XCI. *February* 23. 1738.

George Ord, contra *Charles Wright*.

Does an Action lie for Half the Expence of a March Dyke, if no Requiſition was made to concur previous to the Building?

THE point in diſpute betwixt theſe parties reſolved in this queſtion, Whether an action lay for payment of the half of the expences of a march-dyke, which was begun to be built without requiring the defender to concur in terms of the act 41. Parl. 1661.

For the purſuer it was *argued:* That the law did not make any requiſition neceſſary, the clauſe founded on only requiring, " The next adjacent " heritor ſhall be at equal pains and charges in building, *&c.* that dyke " which parteth their inheritance." By the firſt part whereof, the adjacent heritor may, if he thinks proper, leſſen the expence, by adhibiting the labour of his ſervants; but, if he neglects, in due time, to be at the equal pains neceſſary for building his half of the dyke, then the other alternative takes place, *viz.* That he pay the equal half of the charges laid out upon it. Nor is there any reaſon why the law ſhould make a requiſition neceſſary; ſeeing every heritor, when he ſees his neighbour beginning to build a march-dyke, as he knows the law, ſo he muſt know that this work is an equal concern to each, and that both are equally liable: ſo that,

if

if he imagines he can do it in a cheaper way, or that he can ſave any of the expence, by employing his own ſervants, it is more his buſineſs to require his neighbour to vary the plan, than it is his neighbour's to require him. But, 2*dly*, Suppoſe ſuch intimation was neceſſary, it could be to no other purpoſe, but to certiorate the other heritor, ſo as he might either propoſe a cheaper or eaſier method of building, or leſſen the expence by his own concurrence; conſequently, if intimation has not been made, the omiſſion ſhould go no further than to exoner the other party of ſuch part of the charges as he could have freed himſelf of, if he had been required, and to reſtrict the action to ſo much as it would have coſt him to build his ſhare of a ſufficient dyke in the cheapeſt manner he could have gone about the ſame, had it been intimated to him from the beginning.

Anſwered for the defender: There could be little doubt, if an heritor took the benefit of a march-dyke, when incloſing his ground, before the act of Parliament, he would be liable to the half of the real expence, *in quantum lucratus:* but the act in queſtion goes a great deal farther; as the neighbouring heritor is thereby obliged to concur in building, whether he propoſe to make any benefit by incloſing his own grounds, yea or not; for this law is merely ſtatutary, and conſequently muſt be ſtrictly followed forth: ſo that, if the terms thereof are not obſerved, no action can ly for the half of the expences, that being a benefit or privilege introduced in favours of the builder, which, it is to be preſumed, he throws up, if he goes on with his work without requiring his neighbour to concur with him; and, if the purſuer's doctrine were to take place, That no requiſition is neceſſary, it would be in the power of an heritor to rear up a fence upon his march of any faſhion he has a mind, without conſulting his neighbour, and yet oblige him to pay one half of the expence; a conſequence no ways founded upon the ſtatute, which enacts, "That neighbouring heritors muſt equally concur;" and, of courſe, each muſt have a vote as to what kind the march-dyke ſhould be: the application of which to the caſe in hand is obvious; for, if the purſuer had intimate his deſign of building the dyke, the defender would have inſiſted for a fence with ditch, hedge, and other planting, in which, it is believed, he muſt have been preferred in the choice, becauſe in terms of the act: therefore, it is incongruous the purſuer ſhould obtain a preference of choice by neglecting the law, which no heritor can have, who conforms himſelf to the regulations thereof.

The Lords found the defender not liable in any part of the Expence.

N° XCII. *February* 24. 1738.

Mary Dick, contra *Helen Aiton* and *James Caſſie* her Husband.

A Party is not bound to confeſs or deny, in Terms of the act of Sederunt 18*th* February 1716, *where the Subject claimed is an Accompt preſcribed*, quoad modum probandi.

DICK having obtained a decreet againſt *Caſſie* and his wife for 1000 merks, they afterwards craved, That certain articles of mourning, bed, board,

board, *&c.* furniſhed by them to her might be allowed to be imputed in extinction of the ſums purſued for, conform to an account given in; and inſiſted, That, before they condeſcended, ſhe ſhould confeſs or deny, in terms of the above act of ſederunt.

Mary Dick anſwered: The accompt produced is preſcribed, and only probable by her oath (which ſhe is willing to give;) in which caſe, the act of ſederunt does not take place; it being only calculated for this purpoſe, That people might confeſs or deny a fact that was offered to be proven by witneſſes, That, in caſe it appeared from the proof it conſiſted with their knowledge, they might be liable in expences.

The Lords found the account not probable otherways than by the purſuer's Oath.

N° XCIII. *Eodem Die.*

Captain *Rutherfoord*, contra Sir *James Campbell* of *Abruchill*.

An Action for Payment of an Accompt contracted in England *by one who did not live there ſix Years after the laſt Article thereof, does not fall under the Act of Limitations.*

CAPTAIN *Rutherfoord*, as aſſigney by *Daniel Cockdale* Coachmaker in *London*, to an accompt of furniſhings made by him to Sir *James Campbell* while at *London*, during the years 1724 and 1725, brought a proceſs againſt Sir *James* for payment; and referred the ſame to his oath; the defence was, That more than ſix years ſince, the laſt article of the accompt being elapſed before the proceſs was commenced, the action was cut off by the ſixteenth article of the 21ſt year of *James* I. intitled, *Act for limitation of actions*, &c.

Replied: That the Judges in *Scotland* are bound by the law thereof only, and no laws made in a foreign country can have any authority here; an *Engliſh* preſcription then, *qua* ſuch, can have no more legal authority here than any other limiting, forfeiting, or penal ſtatute made in *England*: ſo far may be true, That, where an account is purſued in *Scotland*, contracted in *England*, which has lain over more than ſix years, the circumſtances of the caſe may infer a preſumption that the debt is not reſting owing; and a reaſonable preſumption it is, for the man, who, in his own country, has delayed making any demand for payment, and allowed the door to be ſhut againſt him by preſcription, may well be preſumed, in another country, to have nothing to claim: and this preſumption ought to meet him bringing his proceſs here, after he is cut out by the laws of his own country; therefore the *Engliſh* act can never be pled higher than to the effect of eſtabliſhing a preſumption in the law of *Scotland* that the debt is paid or not due. But, as to the penal conſequences of annulling the claim, and denying action after ſix years, which are merely ſtatutory, theſe things can never be pled in *Scotland*, becauſe we have no ſuch ſtatute; and, when the matter comes to this, there can be no queſtion that a preſumption of this, or any other kind, may be taken off by a contrary proof.

Duplied from the words of the act: It appears, 1*mo*, That, by the lapſe of ſix years, the action is *funditus* taken away. 2*do*, That there is no exception, as in our acts; for the triennial preſcription, unleſs the debt

debt be proved to be reſting owing, by the oath of the defender; and, ſince there is none ſuch in the *Engliſh* ſtatute, the purſuer cannot be permitted to borrow ſuch exception from the *Scots* ſtatute, and annex it to the *Engliſh* one, which appears to cut off the debts contracted in *England* by the ſix years preſcription, as intirely, as our long preſcription of 40 years, which leaves no room for a reference to the oath of the defender.

Triplied for the purſuer: Where the creditor lives in one country, and the debtor in another, it appears a pretty arbitrary queſtion, Whether the law of the one country or the other muſt be the rule: but, be this matter as it will, it can have no influence upon the preſent queſtion; for, granting that the *Engliſh* preſcription is the rule, yet it can never be ſuch a governing one here as it is in *England*; as an *Engliſh* ſtatute, it cannot ſo much as be pretended that it has any legal or coercive authority here: What then remains further than this, to infer a preſumption that the debt is paid, or not due, where the creditor has allowed the door to be ſhut upon him by the laws of his own country? Tho' this ſhould be ſuſtained as a preſumption, in our law, there can be no doubt, that, were it ten times ſtronger, it may be taken off by the defender's oath. At the ſame time, it muſt be taken notice of, That the defence can ſcarce be reared up into the ſhape of a preſumption, in this caſe, where the defender retired ſoon after the date of the furniſhing, and has continued here ever ſince, and doth not ſo much as pretend that he has made any ſatisfaction, or payment.

For the defender, the deciſion in *July* 1717, *Rae* contra *Wright* was quoted; and, for the purſuer, 16th *July* 1708, *Thomſon* and *Hay* contra Earl of *Linlithgow*.

The Lords found, That Sir James Campbell *not having lived ſix years in* England *from the date of the laſt article in the accompt, the purſuer's action does not fall under the act of Limitations.*

N. B. It appears, from a memorial in this caſe, That it occurred as a doubt to the Lords, at adviſing, whether the ſtatute of limitation could have place in this caſe, tho' the action had been laid in *England*; ſeeing the defender did not continue there ſix years after the furniſhing; and, upon this head, it was obſerved, That, by the above ſtatute, if the plaintiff be beyond ſeas, the preſcription runs not againſt him; but that there is no exception therein, with regard to the defendant, which, however, was altered by the act *quarto Annæ*, *c.* 16. § 19.

N° XCIV. *June* 9. 1738.

John Kennedy, &c. Creditors of Mr. *David Watſon*, contra *Elizabeth Cameron*, Spouſe to Mr. *Watſon*, and Dr. *Cameron*, Son to the deceas'd *John Cameron*.

If a Huſband is unable to perform his Part of a Marriage-Contract, his Creditors have no Right to ſue for Implement of the Preſtations incumbent on the Wife's Part, &c.

BY contract of marriage betwixt the ſaid Mr. *Watſon* and his wife, he obliged himſelf to ſecure ſo much to him and her in conjunct fee and liferent, *&c.*; and, on the other hand, *John Cameron* her father became

came bound to pay a certain ſum in name of tocher, at the terms therein mentioned, *&c.*

Mr. *Watſon*'s circumſtances having gone into diſorder, he conveyed his effects to his creditors; whereupon they brought an action againſt the father's repreſentatives, who likeways repeated a reduction of the contract, upon this medium, That *Watſon* had not implemented his part, by ſecuring the ſums provided to his wife.

In this proceſs, compearance was made for Mrs. *Watſon*, who inſiſted, That ſhe was intitled to a modification of an aliment out of her own tocher; founding her plea chiefly on this, That, without any expreſs contract for that purpoſe, a huſband was bound, by every law, human and divine, to maintain his wife; which holds ſo ſtrongly, that any perſon, who furniſhes her aliment, is intitled to an action againſt the huſband, for the value of what was furniſhed, being in ſo far conſidered as a creditor to him; and, if Mr. *Watſon* himſelf were inſiſting for payment, the defenders would have been intitled to detention of what was beſtowed for her aliment; and there is the ſame reaſon for retaining the portion here for this purpoſe, as ſhe is now diſappointed of her aliment, by her huſband's not performing his part; more eſpecially as there can be no doubt, that the tocher was promitted with the view of that obligation the huſband is under to aliment his wife, which he not being in a condition to do, the portion ought to be ſo applied.

Anſwered for the creditors: That there could be no doubt, there was a natural obligation upon a huſband to aliment his wife; and, in caſe he refuſed ſo to do, a Judge might modify an aliment out of his effects, which would become a proper debt, and the foundation of diligence, ſo as to compete with creditors: but that did not apply to the preſent queſtion, where the huſband has nothing to maintain himſelf; in which caſe, his obligation to aliment was at an end, as no man could be obliged to impoſſibilities. *2do*, When the law has diveſted the huſband of his effects in favours of creditors, it has not laid them under any obligation to aliment their debtor's wife out of theſe ſubjects. *3tio*, Suppoſing an aliment were to be modified to Mrs. *Watſon* againſt her huſband, yet it would be but a perſonal debt, which could not compete with creditors, who, ſeveral years ago, diveſted Mr. *Watſon*. And here it is neceſſary to obſerve, That there is a legal difference betwixt aliments that are due *jure naturæ*; for inſtance, by a huſband to his wife, or by parents to their children, and aliments due by a ward ſuperior to his vaſſal, or by a liferenter to a fiar, or the apparent heir of the fee. In the *firſt* caſe, the obligation ariſes from the perſonal connection betwixt the party to be alimented, and the perſon liable to that burden, without any relation to his eſtate; and therefore the claim of aliment does not really affect any part of his eſtate heritable or moveable; conſequently, ſuch obligation can have no effect againſt his ſingular ſucceſſors, whether legal or voluntary. But, in the *ſecond* caſe, the ward, vaſſal, or the fiar, has a proper legal intereſt in the lands, without any regard to the poſſeſſor of the caſuality of ward, or of the liferent; and therefore their right of aliment is not altered by a conveyance.

Replied for Mrs. *Watſon*, and Doctor *Cameron*, the repreſentative of *John Cameron*: It is a principle of law univerſally acknowledged, That, if

if one becomes bound, under any condition expreſſed or implied, to pay or perform, that condition, whether ſuſpenſive or reſolutive, is an inherent quality in the obligation; ſo that it is either not obligatory, or the obligation not exigible until the condition is purified; for, in all mutual contracts, performance on the one part is underſtood to be the mutual cauſe, and a condition of the performance on the other: it is therefore plainly repugnant to theſe principles, That, where the obligation is reciprocal, action ſhould be competent to either of the parties againſt the other, without previouſly performing what he himſelf is bound to.

Duplied for the creditors: Whatever be the caſe of common mutual contracts, wherein mutual preſtations are the adequate cauſe of each other, contracts of marriage are of a very different nature; there the marriage is properly the cauſe of all the ſtipulations on either ſide, and the marriage-articles are no more but conventional ſettlements of the legal rights that ariſe from the marriage; the tocher comes in place of the *jus mariti*; the wife's jointure in place of her terce and third of moveables, *&c.* And, as theſe legal rights will take place where they are not excluded by a contract, without any regard to the eſtate brought by the huſband or wife; ſo it is impoſſible that the marriage-contract can be conſidered upon the footing of other mutual contracts, where the one party's obligement is the adequate cauſe of the other's. A man may provide his wife in a jointure, tho' ſhe brings no tocher; and the wife's want thereof will not prejudge her legal rights; which is a demonſtration that a marriage-contract is not like a bargain of ſale, that cannot ſubſiſt without a price.

Triplied: It is incumbent upon the creditors to point out the law or reaſon of the thing, that ſhould make a diſtinction betwixt contracts of marriage and other mutual contracts. The genius of moſt laws have leaned the other way, to put them on a more favourable footing. By the antient law of this country, they had a preference amongſt their huſband's perſonal creditors. And, as to the obſervation, That the marriage itſelf is in part the cauſe of the mutual obligations *hinc inde*, it was anſwered, That, if the huſband marries the wife, the wife marries the huſband, and, in ſo far, they are at leaſt equal; and tho' the proviſions *hinc inde* are no doubt gone into, from a view, and upon ſuppoſition of the marriage which is to follow; yet it is ludicrous to ſay the marriage itſelf is any part of the onerous cauſe of the mutual contract. The *Romans* ſurely had a quite different notion of the matter, when they required an exact equality betwixt the *dos* and *donatio propter nuptias*, as the *quid pro quo*; and the ſtile of our marriage-ſettlements ſtrongly confirms the truth of this propoſition: the huſband obliges himſelf to ſecure the wife in a certain liferent, *&c.*: *for the which cauſes*, ſhe, or whoever contracts for her, becomes bound to the huſband; thereby plainly denoting, That the obligation, on the one part, is the mutual cauſe, on the other; at leaſt, That, as the huſband is firſt in the obligation, the performance, upon his part, is a condition of the wife's being bound at all.

The deciſions referred to for the creditors, were, *November* 25. 1709, *Margaret Turnbull*; *David Reid* contra Lady *Ruthven*, *anno* 1726; daughter of *Alexander Falconer* againſt his creditors, *February* 1736.

For

For Mrs. *Watſon*, *&c.* the following caſes were quoted; *Elizabeth Hart contra* the creditors of *John Strachan* her huſband, *February* 1735; *December* 1721, *Selkirk*; *February* 1673, *Murdoch*; 13th *July* 1670, *Rait*.

The Lords found, That, notwithſtanding the preſtations by Mr. David Watſon, *in favours of his wife were not performed, yet ſhe,* ſtante matrimonio, *was not intitled to an aliment out of her own portion or annualrents thereof, in competition with her huſband's creditors, who had done diligence to affect the ſaid ſums; and found, That the creditors were intitled to compel* Doctor Cameron *to ſtock out ſuch of the bygone annualrents of the tocher as ſhall be found yet due to make up with the principal, the ſum which Mr.* David Watſon *was obliged, by the contract of marriage, to ſecure in the terms thereof.*

But, thereafter, 5th of *December* 1738, *The Lords found, That Mr.* Watſon *not having performed his part of the contract, and being now utterly incapable to perform, that therefore the creditors have no right to purſue for implement and performance, either by paying or ſtocking out the annualrents.*

N° XCV. *June* 13. 1738.

Andrew Rowand, contra *William Lang*.

Septennial Preſcription.

THomas Mitchel, as principal, and the ſaid *Lang*, as cautioner, granted a bond to *John Rowand* for one hundred merks, of date the 29th of *January* 1707, which was regiſtrate the 27th of *January* 1714, in the Town-court Books of *Glaſgow*; and, that ſame day, both principal and cautioner were charged: as alſo, by another execution, it appeared they were likewiſe charged the year thereafter. *Andrew Rowand* being aſſigned to this bond, charged the cautioner, *anno* 1736, with horning; who ſuſpended upon this ground, That, by the act 1695, anent cautioners, the ſame was preſcribed, there being no diligence execute within the ſeven years that could have any effect after the expiry thereof; the only thing done being a charge given by a Town-officer two days before expiring of the firſt ſeven years, which could have no effect at all; becauſe, two days thereafter, the ſeven years expired: and ſo, neither poinding nor caption could follow thereon againſt the ſuſpender, until after the time was elapſed. And, as to the other charge, it was good for nothing, being many months after the expiry of the firſt ſeven years. But, 2*do*, Granting the firſt charge were to be conſidered as an interruption of the preſcription (altho' the defence that ariſes from the act has ſcarcely any thing in common therewith,) yet the outmoſt length it could operate was to preſerve the cautionry-obligation from being cut off by the lapſe of the firſt ſeven years; but, even on this ſuppoſition, it ſtill preſerved it a cautionry-obligation, ſubject to the ſtatute; and, therefore, as it lay over afterwards for more than ſeven years, without any diligence done, it became, of new, cut off by the ſeptennial act.

Anſwered

Answered for the charger: The import of the ſtatute is not only to ſave diligence done againſt the cautioner, within the ſeven years, for the principal ſum and annualrents that fell due within that time, but it likeways declares, That ſuch diligence ſhall have its courſe and effect. Now, one of the chief effects thereof, is, to ſerve as an interruption to prevent the cautioner's obligation from preſcribing, as to what it is declared to ſubſiſt for, in caſe of diligence within the ſeven years: and, if the gloſs put upon the act by the ſuſpender ſhould hold, it were hardly poſſible that a cautioner's obligation could ſignify any thing, unleſs it attained its full effect, by poinding or adjudication, *&c.* in the lifetime of the cautioner; whereby the *ſalvo*, in favours of the creditor, would be of no avail; therefore the law muſt be underſtood to ſave, to the creditor, the principal ſum and annualrents falling due within the ſeven years, by any diligence, in that period, ſufficient to make interruption. And, with reſpect to the ſecond point, it is a jeſt to pretend, That, after running the firſt ſeven years, a new preſcription commences, as the act ſays no ſuch thing; but, on the contrary, ſpeaks of ſeven years from the date of the bond: ſo that, if any diligence was uſed for interruption within that time, the bond muſt ſubſiſt thereafter againſt the cautioner, for what fell due within that period, during the courſe of the long preſcription.

The Lords repelled the reaſon of ſuſpenſion; and found the letters orderly proceeded for the principal ſum and penalty, and what annualrents fell due within the ſeven years.

N° XCVI. *June* 15. 1738.

Legators of Mrs. *Hannah*, contra *Henry Guthrie* Writer in *Edinburgh*.

An Executor-nominate is liable to account for the Reſidue of the free Effects to Legators, if it appear, by his Oath, the Teſtator truſted to his faith to diſpoſe of it in that Manner.

MRS. *Hannah* execute a teſtament, wherein ſhe appointed Mr. *Guthrie* her executor, and burdened him with certain legacies to her relations; ſignifying to him, at the ſame time, That, whatever reſidue of her effects ſhould remain over and above her debts, and legacies, and a reaſonable gratification to himſelf for his trouble, it was her will or pleaſure, he ſhould make a fair diſtribution thereof amongſt her friends, in proportion to their legacies expreſſed in the teſtament.

Upon her death, the legators brought a proceſs againſt Mr. *Guthrie* for the free balance of the effects, and referred it to his oath, whether or not the teſtator had not truſted to his faith and promiſe to apply the ſame in that manner; in conſequence whereof, he deponed; That, Mrs. *Hannah* told him, at the time the teſtament was execute, and he accordingly believed, That, after payment of the debts and legacies in the diſpoſition, there would be ſome ſmall thing over, which would be more than a gratuity for his own pains; and that he underſtood, That, if the remainder, after paying the debts and lega-

cies, ſhould come out to be any thing conſiderable, that he, tho' named executor, was to have no more than a reaſonable gratuity for his own pains, he being no ways related to the defunct, nor never having been acquainted with her, till a ſhort time before her death. And, further, he deponed, That, after Mrs. *Hannah*'s death, he promiſed to a Lady, who was a friend of hers, to diſpoſe of the effects as ſhe ſhould direct, deducing a gratuity to himſelf; becauſe ſuch he underſtood to be the will of the defunct. Whereupon the legators pled, 1*mo*, That the teſtament ſufficiently excluded the neareſt of kin from the office of executor, by nominating the defender executor-teſtamentar, and from the benefice, by burdening him with the legacies, partly expreſſed, and partly committed to the faith and credit of his promiſe. 2*do*, That there was a ſufficient active title in the purſuers to inſiſt in this action, without any confirmation by the defender's promiſe made to the defunct; whereby it was plain, this caſe was as directly a proper *Roman fidei-commiſſ.* as any that poſſibly could occur; the defender being fiduciary, and the purſuers the *fidei-commiſſary* heirs, as to the ſuperplus of the defunct's effects above her debts and legacies. See § *ult. inſt. De fidei-com. hæred.* *L.* 23. and *ult. cod. de fidei-com.* Neither ought it to be any objection, That this ſuperplus may ſeem to be of the nature of verbal legacies, which, according to our law, cannot have effect above *L.* 100 *Scots* to each legator; ſeeing, tho' we do not allow the effect of verbal legacies to be extended beyond *L.* 100 *Scots*, where the proof of them is reſted, by the defunct, on the credit of witneſſes, and not on the faith and promiſe of the executor-nominate, even tho' the executor acknowledge the verity of the bequeathment; yet reaſon and juſtice require, That, where the defunct has depended on the faith and promiſe of the executor, and not on the credit of witneſſes, the ſame ſhould be made effectual; as all promiſes are, with us, whether made to the living or dead, they being proved, as here, by the oath of the party.

The Lords, in reſpect of the acknowledgement, on oath of the executor (who, by the will, hath right to the reſidue of the effects, if any be, after payment of the legacies,) That he underſtood it to be the will of the defunct, that he was to account to the legators proportionally to their ſeveral legacies for the remainder of the effects, after payment of the legacies, and a reaſonable gratification to himſelf, found him liable to account.

N° XCVII. *June* 27. 1738.

Anna Biggar, contra *John Scot*.

A Tenant, after his Removal, is not liable in a perſonal Action, at the Superior's Inſtance, for Payment of the Feu-duties.

James Buchannan being debtor in the ſum of nineteen pounds *Sterling*, by bill, to the ſaid *John Scot*, ſet to him ſome graſs-grounds, of which he was proprietor; and, by the agreement, *Scot* was to diſcount ſix pounds *Sterling*, as the rent thereof, from the ſaid bill. In conſequence of this bargain, *Scot* entered to, and poſſeſſed the land, from *October* 1735, to *Whitſunday*

Whitſunday following, when he removed. And, in *July* thereafter, the ſaid *Anna Biggar*, as aſſigney from the ſuperior of the ground, brought an action againſt *Scot* for payment of one hundred merks, as the feu-duty, payable out of the ſaid land, from *Whitſunday* 1735, to *Whitſunday* 1736.

It was *Pled* for *Scot*, That the rent, due by him to *Buchannan*, was compenſated by the bill he owed to him, which being equivalent to payment, would have been a good defence againſt *Buchannan* the proprietor, had he been purſuing for the rent; conſequently, it muſt be as available againſt his ſuperior inſiſting, in a perſonal action againſt the tenant, for payment of the feu-duty. In ſupport whereof, it was obſerved, That, as the law ſtood antiently, the only remedy competent to a ſuperior, whereby he could recover his feu-duties from the natural poſſeſſors, was, by the brieff of diſtreſs, which intitled him to poind goods, belonging to the tenant, for the proprietor's debts, notwithſtanding they exceeded the term's mail; but, this being conſidered as a grievance, was rectified by the act 1469. But ſtill, the ſuperior is intitled, ſo far as the tenant's rent does extend, to force payment, by poinding his effects, even before the term of payment of the rent; ſo that the current rent ſeems hypothecate to the ſuperior for ſecurity of his feu-duties, and which he is intitled to exact from the tenant, even before the term falls due: the reaſon whereof ſeems to be, That, as the feu-duty is a real burden affecting the ground itſelf, and payable out of the fruits; conſequently, it ſubjects the intromitters perſonally, and the tenants, or natural poſſeſſors, are conſidered as the intromitters with the fruits, ſo long as the term of payment of the rent to the proprietor is not come; becauſe, before that, they are not properly debtors to their maſter in the rent; therefore, if the ſuperior, by his real right, does evict the ſame from the tenant, before the term of payment of the rent, ſo ſoon as it comes, he ceaſes to be debtor to the maſter, payment to the ſuperior being full exoneration to the tenant: whereas, on the other hand, if the ſuperior lies by till after the term of payment, the tenant becomes then debtor to the maſter, and the ſuperior loſes any action, real or perſonal, which he had againſt him for the laſt term's rent; in lieu whereof, the ſuperior comes to have a preference upon the next term's mail: ſo that, in a word, it is the current mail, for which the tenant is liable to be diſtreſſed for the feu-duty. Now, as the ſuperior, in this caſe, did no diligence, until after the term of payment of the rent, nor till after the tenant had removed; therefore, as payment to the proprietor would have been good, compenſation muſt be equally available; as it operates, *in ipſo jure*, extinction of the debt.

It was anſwered for the purſuer: That compenſation can only take place where there is a *concurſus inter eaſdem perſonas*, and after it is proponed; conſequently, as neither *Buchannan*, nor any, in virtue of a title from him, are inſiſting againſt the defender, compenſation does not apply to this caſe. Neither is it to the point, That the defender was creditor to *Buchannan ab ante*, whereby the rent, as is alledged, was no ſooner due than paid; ſince there is nothing plainer, in our law, than that compenſation does not operate *ipſo jure*, but upon being proponed. Now, to this day, there has been no clearing betwixt the defender and *Buchannan*, nor no diſcharge granted by *Buchannan* to him; neither has he proponed compenſation againſt *Buchannan*: ſo that it is impoſſible the bill, which is prior to the defender's poſſeſſion, can be reckoned a diſcharge; and, as it was never proponed againſt *Buchannan*, it could be no bar to him to demand

mand his rent, until the defence was made; much leſs can it operate againſt the purſuer, who is not obliged to take notice what debts were betwixt them two; ſince no legal diſcharge of the tack appears. Beſides, as a tenant ought to know his maſter's title, and what affects the fruits, he ſhould not pay till he is ſure ſuch burdens, as could affect him, are cleared.

At adviſing this cauſe, the Lords " found, That *John Scot*, the tenant, " being removed before intenting of this action, he is not liable to a per- " ſonal action at the ſuperior's aſſigney's inſtance for payment of the feu- " duties." As this Interlocutor was founded on a point not formerly inſiſted upon; therefore the purſuer reclaimed, ſetting forth, That a perſonal action was competent to a ſuperior for payment of his feu-duties, of the ſame nature and kind that is competent to a proprietor for payment of his rent. To inforce this it was pled, That it was not a juſt conception of the nature of ſuperiority and vaſſalage, to conſider the ſuperior's caſualties as a burden upon the vaſſal's property, ſeeing the matter lay directly the other way; for the radical right remained with the ſuperior, and the vaſſal's intereſt was nothing elſe but a burden on the property: hence, ſuppoſing his title any how annihilated, the ſuperior's right, like air compreſſed, expanded itſelf over the whole, and the ſuperior thereby became abſolute proprietor, juſt as he was before the vaſſalage had a beginning. On the other hand, this reaſoning would not apply to the vaſſal's intereſt, which is limited, and would not turn out more extenſive, even tho' the ſuperiority was ſuppoſed to be annihilated. That this is the juſt conception of the matter, is evident from this, That a ſimple renunciation, or, which is no better, a reſignation, *ad remanentiam*, totally ſopits the vaſſal's title, no more being neceſſary to extinguiſh a burden, real or perſonal: but, as a diſcharge, or renunciation, operates no conveyance, theſe can ſignify nothing in the caſe of property, unleſs another, at the ſame time, be inveſted: hence it is, that a renunciation, or reſignation, *ad remanentiam*, of the ſuperiority in the vaſſal's hands, is of no avail. The law ſo ſtanding, it is evident, That the property itſelf remains with the ſuperior, unleſs ſo far as limited by the burden impoſed upon it in favours of the vaſſal; and therefore every ſingle caſuality of the ſuperiority ought to be conſidered in no other ſhape than as acts of property, which the ſuperior is intitled to exerce, *qua* proprietor of the lands; becauſe, ſo far as theſe go, his property is not limited, which now leads directly to the caſe in hand; for the feu-duty, payable to the ſuperior, is, by our law, underſtood to be a branch of his property, as much as any other caſuality; conſequently, with regard to the feu-duties, he can exert every act of property upon the ſubject, in the ſame manner he could have done before the feu was conſtitute. Upon this footing it is, that all our Writers agree the ſuperior has right of hypotheque upon the rents, for ſecurity of his feu-duties. See *Craig*, *lib.* 2. *dig.* 9. § 11. Sir *George Mackenzie*, *book* 2. *tit.* 6. § 12. *Stair*, *lib.* 2. *tit.* 4. § 7.; which demonſtrates the ſuperior's property in the rent: and, when the precedents are looked into, it will be found, the perſonal action for payment of the feu-duties is very different from the real one of poinding the ground, both with regard to its foundation and effects; nor does the perſonal action depend upon, or conſequential of the real one, for poinding the ground, they having very different effects in law; as the one may be competent where the other is not: *e. g.* A ſingular ſucceſſor may be liable, upon a poinding the

the ground for feu-duties 40 years backward; but, if he had not poſſeſſed for above a year, he cannot be liable for more than a year's feu-duty: juſt ſo, an adjudger, an aſſigney to maills and duties, or any other intromitter with the rents of the lands not in the natural poſſeſſion, cannot be reached by a poinding; but it was never diſputed that he might be affected by a perſonal action, *qua* intromitter.

Anſwered for *John Scot*: Whether the vaſſal's right is a burden on the ſuperioty, or, *vice verſa*, is quite immaterial to the point in iſſue; ſeeing the feu-duty is a proper burden upon the vaſſal's title, for the payment of which, he is not only perſonally bound, by the feu-contract; but it is likewiſe a real debt affecting the fee itſelf as a condition and quality of the vaſſal's right. This being the caſe, it would ſeem to have been a ſtretch of the law to give the ſuperior a perſonal action for his feu-duty againſt a third party, who was not bound in the contract; whereas the real action being incorporated with the right itſelf, does follow the property wherever it goes, and was antiently made effectual by the brieff of diſtreſs; whereby not only the proper goods of the vaſſal, but thoſe pertaining to poor tenants, were liable to be pointed *in infinitum*, directly contrary to the principles of juſtice. However, ſince the act correcting that abuſe, the practice has gone to allow the ſuperior even a perſonal action againſt the tenant, from the ſame equitable conſideration, That, in as far as he was ſtill liable to real diligence by poinding, he ſhould likewiſe be obliged to anſwer, in a perſonal ſuit, to that extent; therefore the real action, or brieff of diſtreſs, ſeems the ſolid foundation of the perſonal one introduced by practice; which, of courſe, can never be more extenſive than the one on which it is founded: wherever the real one would be available, the perſonal will likewiſe lie; but, where the effect of the real is loſt, *quoad* the tenant, as it undeniably is by his removal from the grounds, the perſonal action can no longer ſubſiſt, nor is this in the leaſt prejudicial to the ſuperior. Had the tenant remained in the poſſeſſion, he could only have been liable to the extent of his term's maill; and, as the ſucceeding tenant becomes liable to the ſame ſuit, for the like extent, the ſuperior loſes nothing of his former ſecurity, his real right is as intire as before, the vaſſal remaining ſtill perſonally liable, and the immediate poſſeſſor is ſubject both to the real and perſonal diligence, to the extent of his term's maill. Further, if the tenants were perſonally bound to pay the ſuperior's feu-duty, from the ſingle fact of their having poſſeſſed the ground, How is it poſſible they could ever liberate themſelves therefrom, but by actual payment to the ſuperior? and yet it cannot be diſputed, but that, if the tenant had paid his rent to his own maſter, the vaſſal, he would be no longer liable to a perſonal ſuit at the ſuperior's inſtance; which is demonſtration that he is not properly debtor to the ſuperior, nor bound, in a perſonal action, farther than he is liable to the real diſtreſs. Beſides, the eſtabliſhing the purſuer's doctrine would be attended with ſeveral inconveniencies; one of which would be, That no tenant could ſafely pay his rent, until ſuch time as his maſter produced full acquittances from the ſuperior of his feu-duties, *&c.*

The Lords adhered.

N° XCVIII. *July* 4. 1738.

Competition, *Richard Lockwood, &c.* with *William Wilson.*

An Arreſtment, in the Hands of a Conſignatory, upon a lawful Conſignation, is preferable to a poſterior one execute againſt the Conſigner, tho' the Creditor had not accepted the Money, nor the Debtor, previous thereto, obtained a Decreet ſuſtaining the Conſignation.

SIR *James Campbell* of *Auchinbrek* having purchaſed ſeveral adjudications affecting the lands of *Kirnan*, did, in virtue thereof, inſiſt in a ſale of that eſtate; during the courſe of which, it was found, That Sir *James* was bound to communicate the eaſes he had got from the creditors; whereupon a compt and reckoning enſued; from which it appeared there was a balance due to Sir *James*, and which balance *Kirnan*, by a docquet at the foot of an accompt, obliged himſelf to pay, betwixt and *Martinmaſs* then next: this ſum he offered to Sir *James*; but, upon his refuſal, *Kirnan* applied to the Lord Ordinary, craving, That he would authorize him to conſign the money; which was accordingly granted, reſerving the conſideration of what effect it ſhould have. In conſequence of this interlocutor, *Kirnan*, on the 11th of *November* 1736, conſigned the money in the Clerk's hands; and, on the 19th, the Lord Ordinary, after hearing both parties, ſuſtained the conſignation; likeas, on the 12th and 13th of the ſaid month, *Richard Lockwood, &c.* as creditors to Sir *James*, laid on an arreſtment in the Clerk's hands; and, on the 18th, *William Wilſon*, another creditor of Sir *James*'s, arreſted the ſaid ſum in the hands of *Kirnan*; whereupon a competition enſued betwixt them.

Pleaded for *Richard Lockwood:* That his arreſtment, on the 12th, in the Clerk's hands ought to be preferable, in ſo far as the conſignation was lawfully made and ſuſtained by the Ordinary; whereby *Kirnan* was liberate from his obligation, which became void, in the ſame manner as if actual payment had been made to Sir *James*: That, as the debt was extinguiſhed, ſo all collateral ſecurities, of courſe; as alſo, that the money conſigned was not on the peril of the debtor, but of Sir *James* the creditor; and that a lawful conſignation ſtopt the running of annualrents, and freed cautioners, even tho' by mutual conſent, it ſhould be paſſed from. Now, if this doctrine hold true, That the debt was extinguiſhed by the conſignation, it was not tenable, that *Wilſon*'s arreſtment, in *Kirnan*'s hands, after the conſignation was lawfully made, could be effectual; ſince his obligation was extinguiſhed at the date of *Wilſon*'s arreſtment. Neither could it make any alteration in the argument, That, at the date of the arreſtments of both competitors, *Kirnan* could have paſſed from his conſignation and uplifted the money; becauſe, 1*mo*, That would have been contracting a new debt, which could not have been affected by the prior arreſtment. But, 2*do*, Whatever be in this, it was ſufficient for the preſent purpoſe, that *Kirnan* never made uſe of this option, which he is now precluded from, by the foreſaid Interlocutor of the 19th of *November*; after which, it is impoſſible he could be decerned to make the ſum conſigned forthcoming.

Pleaded

Pleaded for *William Wilſon*, who arreſted in *Kirnan*'s hands: That an offer can transfer no right to the thing offered, till it is accepted: now, conſigning the money was only following out the offer, and ſecuring the ſubject in the hands of a conſignatory, that it might be inſtantly forthcoming to the creditor, upon his acceptance, or that thereon the debtor might judicially get his obligation declared extinct, and the money adjudged to the creditor, in ſatisfaction of the ſame; wherefore, in caſe of conſignation, upon the creditor's refuſal to accept payment, there muſt either be an acceptance on the part of the creditor, or a judicial ſentence in favours of the debtor, before the money conſigned can become the creditor's property; and conſequently, the arreſtment, in the hands of the conſignatory, before either of theſe interveened, was null, the money, till then, remaining the conſigner's; which is further evident from this conſideration, That, until one of theſe two things happened, the conſigner had it in his power to uplift the ſums at pleaſure; as is eſtabliſhed by *L.* 19. *C. De uſuris in fine*, and by a variety of deciſions. Neither can it vary the argument, that *Kirnan* did not make uſe of this option; ſeeing the only queſtion here, is, Whether the money was Sir *James*'s the time of *Lockwood*'s arreſtment, or if *Kirnan* was debtor to Sir *James* the time of *Wilſon*'s; for, if the money was Sir *James*'s, it is duly arreſted, and muſt be made forthcoming to *Lockwood*; but, if it was not, then his arreſtment could not affect it.

The Lords found the arreſtment, laid on in the clerk's hands, by Richard Lockwood, *upon the* 12*th and* 13*th of* November 1736, *preferable to the arreſtment laid on by* William Wilſon *in* Kirnan's *hands, upon the* 18*th* November 1736.

N° XCIX. *July* 20. 1738.

Thomas Tait, contra *Thomas* and *Margaret Pollocks*.

Marriage-Contract, whether importing an unalterable Right, or only a Deſtination of Succeſſion.

IN the contract of marriage entered into betwixt *Chriſtian Moriſon* and *John Tait*, he provided her " in and to the haill inſight and houſhold-" pleniſhing, and other moveable goods and gear, belonging to him, " with power to her to uſe and poſſeſs the ſame during all the days of her " lifetime, in caſe ſhe ſurvive, and remain unmarried." The contract further declares, " That, after her deceaſe, it is to be divided in the follow-" ing manner, *viz.* two thirds thereof to *Thomas* and *Margaret Pollock*'s " children, procreate betwixt *Chriſtian Moriſon* and *Hugh Pollock* her ſe-" cond huſband; and, failing of them, or either of them, by deceaſe, " the deceaſer's third to accreſce and belong to the ſurvivor; which fail-" ing, by both their deceaſes, to the ſaid *John Tait* and *Chriſtian Moriſon* " ſpouſes, their neareſt heirs and aſſignies whatſomever; and the other " third of the ſaid moveables, goods, and gear, to pertain to the ſaid " *John Tait*, his aſſignies, or to which of his children he ſhould think fit " to diſpone the ſame before his deceaſe, *&c.*" And, by another clauſe, " the liferent-uſe of the houſhold furniture is reſerved to the longeſt liver

" of

" of them two, with full power to them to meddle, intromit with, poſ-
" ſeſs, uſe, and diſpoſe thereof, at pleaſure." Thereafter, the ſaid *John Tait* diſponed to the ſaid *Chriſtian Moriſon*, her executors and aſſignies, all houſhold-pleniſhing, goods, gear, and effects, that ſhould happen to pertain to him the time of his deceaſe, with this quality or proviſion, That, in caſe *Thomas Tait*, his ſecond ſon, ſurvived his ſaid ſpouſe, the one half of the pleniſhing ſhould, after the deceaſe of his ſpouſe, accreſce and belong to him, or the value thereof, in his option.

John Tait died firſt; whereupon *Chriſtian Moriſon* confirmed the general diſpoſition; and, after her deceaſe, *Thomas Tait* brought a proceſs, upon the above diſpoſition, againſt *Thomas* and *Margaret Pollocks*, for the half of the houſhold-pleniſhing.

For the defenders, it was *pled:* That, from the clauſes above recited, it is plain, That two thirds of the houſhold-pleniſhing are declared abſolutely to belong to them *nominatim*; in ſo much, that the portion of the deceaſing is ordained to accreſce to the ſurvivor; and, failing of him, only to *John Tait* and *Chriſtian Moriſon* their heirs and aſſignies; from which it is plain, *John Tait* did not intend to retain a power to alter, with reſpect to this proviſion in their favours; conſequently, a *jus quæſitum* was thereby acquired to the defenders, which could not be taken from them by any gratuitous deed of *John Tait*'s; more eſpecially, as marriage-contracts are ſolemn deeds, and the articles therein mentioned are preſumed to be agreed upon for onerous cauſes. It is true, That, in many contracts of marriage, the huſband and wife are underſtood to be fiars, when the liferent is only provided to them, and the fee to the children *naſcituri*. But the preſent caſe is quite different; as the defenders are *nominatim* put in the fee of the ſubject, by the ſettlement in the contract. Neither can the words, " with full power to them to meddle, intromit with, poſſeſs, " uſe, and diſpoſe thereof, at their pleaſure," vary the argument; as that clauſe can never be pled ſo high as to give the huſband a power to alter gratuitouſly, thereby to overturn the whole tenor of the contract; more eſpecially, as, from the words ſubſequent thereto, *viz.* " which liferent-
" proviſion above mentioned, *&c.*" it is plain, the power of diſpoſal is ſoly applicable to the liferent competent to the huſband and wife, that clauſe being intended only to convey to the liferenters ſuch a faculty, power, and uſe, over theſe goods, as was conſiſtent with their liferent-right.

Anſwered for the purſuer: The contract contained not only the ordinary proviſions in marriage-ſettlements, but, further, clauſes which were fitter for a teſtament; in ſo far as the huſband thereby nominates thoſe whom he intended for his ſucceſſors in his moveables. It is true, the nomination is not made in words commonly uſed in proviſions of ſucceſſion; inſtead of inſtituting heirs or executors, the terms in this deed are, " af-
" ter the diſſolution of the marriage, by both our deceaſes, ſhall be di-
" vided, *&c.*" But, it is thought, it would be wreſting what appears to have been the meaning of parties to a ſtrange degree, if theſe words were interpreted as conſtituting an unalterable right in the defenders to two thirds of the purſuer's father's moveables. In ſhort, the meaning of the clauſe is, That, upon ceaſing of the liferent-right of the moveables, conſtitute in favours of the wife, in caſe of her ſurvivance, the defenders ſhould ſucceed to two thirds thereof, and the purſuer to the other third, in caſe the ſaid moveables ſhould not be diſpoſed of; ſo that it is plain,

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this was only a deſtination of ſucceſſion; which is further evident from the words, "reſerving to the parties power to diſpoſe of the ſubjects at their pleaſure." Neither can there be any doubt, but that, notwithſtanding this declaration of the huſband's intention, he could have ſold, or gifted the moveables; as that would have been no more than altering a ſimple deſtination. Beſides, if it had been intended to have ſtript the huſband of the property, and to make him only a naked liferenter, ſome words would have been found, importing that intention, which no where occur in the contract.

The Lords found, That the proviſion in the contract of marriage, between John Tait *and* Chriſtian Moriſon, *providing two thirds of their houſhold-pleniſhing in the events, and with the reſerved powers therein mentioned, in favours of* Thomas *and* Margaret Pollocks, *children of the ſaid* Chriſtian Moriſon, *imports only a deſtination of ſucceſſion; and that the ſame was alterable by the ſaid* John Tait, *with conſent of the ſaid* Chriſtian Moriſon, *at pleaſure; and found the ſame accordingly altered by the diſpoſition, by the ſaid* John Tait, *in favours of his ſaid ſpouſe, and accepted by her, whereby the half of ſaid houſhold-pleniſhing is, in the event therein mentioned, granted to* Thomas Tait *the purſuer; and therefore ſuſtained proceſs at his inſtance for the half.*

N° C. *July* 21. 1738.

Procurator-Fiſcal of the High Court of Admiralty, *contra Mackenzie* of *Corrie*.

A Libel, concluding for a Fine and Incapacity before the Admiral, may be tried without an Aſſize.

THE queſtion betwixt theſe parties, was, Whether the Admiral could judge, without a Jury, on a libel brought at the Fiſcal's inſtance only, againſt *Corrie*, charging him with plundering and pillaging boats on the high ſeas, exacting foreland dues, *&c.* contrary to the ſtatute 1705; concluding for a fine of *L.* 100 *Sterling*; and that he ſhould be declared incapable to exerce the office of bailliary in time coming.

For the Procurator-Fiſcal, it was *contended:* That neither by law, nor cuſtom, an aſſize was requiſite or competent, the matter libelled not being capital, or what was puniſhable; and, as the Judge-Admiral has a ſovereign juriſdiction, both civil and criminal, in matters done upon, or concerning affairs at ſea, he has likewiſe a mixed juriſdiction in matters betwixt the two, which are of the nature of treſpaſs and damage; and, as Baillies of regality, ſheriffs, *&c.* can judge in treſpaſſes or ſpulzies, *per modum querelæ*, without an aſſize, in the ſame manner may the Judge-Admiral.

For the defender, it was *anſwered*: That the tranſgreſſions ſet forth in the libel were, in the moſt ſtrict ſenſe, crimes which ought to have been judged by an aſſize: to inforce which, it was obſerved, That antiently, not only criminal, but civil cauſes were tried by a jury *per pares curiæ*;

and, tho' that practice, in civil matters, had, for the moſt part, gone into diſſuetude, yet there ſtill remained ſome inſtances where it was obſerved; as in perambulations and the like: but, as to criminal cauſes, the antient law ſtill obtained, in ſo much that the ſmalleſt verbal injury, that was triable in the Court of Juſticiary, behoved to go to the knowledge of an inqueſt. It is true, That, ſince the conſtitution of Juſtices of the Peace, who have power to try ſmall breaches of the peace, *de plano*, it has become the practice of other inferior courts to try leſſer delicts, without the aid of an aſſize; yet, it is remarkable, that it continued a long while a doubt, if ſuch trials were legal; as appears from the deciſion *July* 24. 1633. But, where the crimes libelled are of an heinous nature, ſuch as thoſe charged againſt the defender, it is believed, there is no inſtance can be given where ſuch a trial has been countenanced without a Jury. Nor is it any ways concluſive, That, becauſe the law has intruſted inferior judges with a power to inflict an unlaw of *L.* 50 *Scots*, without the intervention of a Jury; that therefore it has intruſted any judge with the inflicting a penalty of *L.* 1000 *Sterling*, and incapacity in the ſame manner.

Replied: Where a Court, ſuch as the Juſticiary, was veſted with a pure and ſimple criminal juriſdiction, all crimes and delicts, whether atrocious in their own nature or not, behoved to be tried by an aſſize: but that could have no influence in the preſent diſquiſition; as the Court of Admiralty is endued with a mixt juriſdiction, and has the cognizance of all maritime affairs, both civil and criminal: ſo, in the manner of explicating that juriſdiction, it is not reſtricted to the method of procedure in the Court of Juſticiary, but has the ſame latitude, either to try crimes and delicts by way of complaint, or by Jury, that Sheriff-courts, and others, poſſeſſed of a mixt juriſdiction, has; it muſt therefore be the circumſtances and quality of the crimes that muſt point out the method of procedure, otherways all crimes whatever behoved to be tried by an inqueſt, before whatever court they are brought; by which means, the well known diſtinction between capital crimes, puniſhed with loſs of life, or limb, and ſuch as are not capital, but ordinary, where the puniſhment is determined by law; and extraordinary, or arbitrary crimes, which are left to the diſcretion of the Judge, muſt evaniſh; a diſtinction which is founded in the civil law, as *Matheus* obſerves, in his title *De acquiſitionibus*. And, as the criminal facts complained of do not amount to tinſel of life or limb; therefore, it is apprehended, That the trial, by way of complaint, was extremely competent, without the neceſſity of a Jury.

The Lords found, That the Judge-Admiral could judge in this libel without a Jury.

N° CI.

N° CI. *July* 21. 1738.

Margaret, &c. *Campbells*, contra *Jean Campbell*, Lady *Inverliver*, and her Husband.

A Daughter, who renounces her Father's Succeſſion, cannot compete for the Office of Executor to him with the Children of her Brother in familia, *the Time of the Renounciation.*

Dougal Campbell of *Shirvine* had iſſue, *Archibald Campbell*, and the ſaid *Jean*; when *Jean* was married, her father gave her a tocher, which ſhe, with conſent of her future ſpouſe, accepted, in full ſatisfaction of all portion natural, bairns part of gear, executry, legacy, or others whatſoever, which ſhe could expect, or that might accreſce to her, be and thro' her father or mother's deceaſe, or by virtue of her parents contract of marriage, or other ſecurity whatſoever.

Shirvine having died, his grand-daughters, *Margaret*, &c. *Campbells* (*Archibald*'s children,) moved an edict for ſerving themſelves executors, *qua* neareſt of kin to *Shirvine* their grandfather; and inſiſted, That, by the above diſcharge, *Jean*, their aunt, was *foris-familiate*, and excluded from any legittim, which now belonged to *Archibald* her brother, the other child *in familia*, and his deſcendants, as if ſhe had never exiſted: ſo her right of ſucceeding to her father, with reſpect to the dead's part, was excluded, and the ſame belonged to his ſon and his deſcendants. That *Archibald* being now dead, the movers of the edict, his daughters, were intitled to take up their grandfather's moveable ſucceſſion; and that *Jean* could not, in contradiction to her own renounciation, claim any part of her father's ſucceſſion, not the legittim; becauſe ſhe was *foris-familiate* by the diſcharge granted in her father's life, nor the dead's part; ſeeing ſhe had received a tocher in ſatisfaction thereof.

Anſwered for *Jean Campbell*: It was impoſſible to find the purſuers were neareſt of kin, when ſhe, who was confeſſedly nearer, was compearing and competing: That, with reſpect to the renounciation, as it was in favours of her father, ſo the benefit thereof accreſced to his heirs *ab inteſtato*; which ſhe, as his neareſt of kin, was, in the ſame manner as a renounciation of a right of ſucceſſion in heretage, would not bar the renouncer from taking the ſucceſſion as heir, if there was no ſettlement made excluding the renouncer.

Duplied for the purſuers: That, as moveables were, by law, underſtood to be deſtined for proviſions to younger children; ſo the import of tranſactions between a father and his younger children, with regard to his moveables, had received a fixed interpretation, *viz.* That, where the father gives a tocher to a younger child, but without taking a diſcharge, he was underſtood to intend that the child ſhould ſucceed in his moveables with the reſt, ſhould take her legittim as a bairn, and her ſhare of his other moveables, as heir *ab inteſtato*: but, where he gives the tocher in ſatisfaction of the legittim, this *foris-familiates* the child, and the other children take the legittim, as if ſhe had predeceas'd the father, however, ſhe

ſhe ſtill takes the ſucceſſion of the dead's part, as neareſt in kin, with the other children. But if, as in the preſent caſe, ſhe accept of her portion in ſatisfaction, not only of the bairns part, but alſo of the executry, there it is underſtood that ſhe has got her ſhare of her father's ſucceſſion by anticipation; ſo that ſhe can no more claim, upon her father's death, to draw a ſhare with his other deſcendants: That, in caſe of no ſuch renounciation, ſhe could claim a double portion; and there lies a material difference betwixt a renounciation of an heritable ſucceſſion, and one of moveables; an heritable ſucceſſion cannot be taken, but by ſervice, and none other can be ſerved, but who are heirs of the inveſtiture; therefore, as a renounciation cannot alter the inveſtiture, it cannot exclude the renouncer, if heir, nor give the right of ſucceſſion to another: but it is quite otherwiſe in moveables, where both the office, and the right of ſucceſſion, may be renounced; and, as the renounciation will exclude the renouncer, ſo it will give the next in kin a right to claim the office, and to take the ſucceſſion.

Triplied: The purſuers are endeavouring to introduce a ſoleciſm, hitherto unknown in the law of *Scotland*, *viz.* That any remote relation ſhould be preferred to the neareſt of kin in a moveable ſucceſſion, never yet taken up; founding their argument on a miſtaken ſuppoſition, That the renounciation of a child extinguiſhes the *jus ſanguinis*, juſt as if the renouncer were naturally dead; which is by no means the caſe. And, as a demonſtration of the contrary, let it be ſuppoſed, which may often happen, That a man has provided all his children, and taken renounciations from every one of them, would it not be abſurd to maintain, That, upon the father's deceaſe, ſome remote couſin, who would be his neareſt of kin, if all his children were actually dead, ſhould take his moveable eſtate in excluſion of them.

The Lords found, That the defender and her huſband having, in their contract of marriage, accepted of a ſum in ſatisfaction of her father's ſucceſſion, they cannot compete for the office of executor with the purſuers, the children of a ſon in familia, *the time of the renounciation.*

N° CIII. *November* 10. 1738.

Robert Pollock, contra *George Storrie.*

1. *Benefit of a poſſeſſory Judgement, to whom competent?* 2. *Does the Right of Redeeming a temporary Reverſion,* in græmio juris, *preſcribe by the Lapſe of forty Years, tho' no Decreet of Declarator of the Irritancy has been obtained?*

IN *September* 1688, *Archibald Anderſon*, burgeſs in *Paiſley*, granted a bond for 250 merks, to *John Park*, which he oblged himſelf to pay (with intereſt from *Martinmaſs* then next,) to him at *Martinmaſs* 1695; and, for his better ſecurity, he diſponed to *Park* a houſe and yard, *&c.* in the burgh of *Paiſley*; and which contained this clauſe of reverſion: That, in

in caſe the ſaid *Archibald Anderſon* ſhould make payment of the principal ſum, *&c.* at the term above ſpecified, then, and in that caſe, the houſe, *&c.* was declared to be redeemable from *Park* and his foreſaids, without neceſſity of a declarator; but, in caſe he and his foreſaids ſhould fail in the payment of the ſaid ſums, at the term of *Martinmaſs* 1695, then the houſe, *&c.* is declared to be irredeemable from *Park* in all time thereafter.

Upon this diſpoſition, he took infeftment that year; and, in the 1694, he diſponed the ſubject to *John Storrie*, who was alſo infeft; however, it would ſeem, that *Storrie* did not obtain poſſeſſion of the ſubjects diſponed for upwards of ten years after the irritancy of the reverſion was incurred; for, by a decreet of removing obtained by him againſt *Archibald Anderſon* before the Bailies of *Paiſley*, *anno* 1705, it appeared, that *Anderſon* was decerned to remove, to which he gave obedience, by quitting the poſſeſſion to *John Storrie*, who, and his ſon *George*, continued to poſſeſs the ſame for more than 40 years after *Martinmaſs* 1695, when, by paction, the reverſion was to become void.

Robert Pollock having obtained a right to theſe ſubjects from the heirs of *Archibald Anderſon*, brought a proceſs of maills and duties thereon.

Pled for *George Storrie*: That his ſaſine, as heir to his father, was dated in the year 1725; from which it was plain he had the benefit of a poſſeſſory judgment, even by more than ſeven years poſſeſſion, on his own infeftment; and that the proceſs of maills and duties was a little too ſummary after the lapſe of ſo many years; as it required at leaſt a reduction or declarator of redemption to proceed before the right acquired by the purſuer could be effectual for a poſſeſſory action. *2do*, By the rights produced, it appeared the purſuer's authors were long ago denuded; and, tho' that was under reverſion, from ſeven years, ending at *Martinmaſs* 1695, and whereof the irritancy being incurred, yet the diſponer might be intitled to be reponed againſt the lapſe of the time; but, having made no application for ſuch remedy, in any ſhape whatever, till more than 40 years were elapſed after the conventional irritancy was incurred; That any relief or claim to be reponed, was now cut off by the negative preſcription.

It was *anſwered* for the purſuer: That the real right was granted for ſecurity of the ſum lent; ſo that it was plain, if *Park* or his aſſignies had poſſeſſed the tenement for a thouſand years, he was ſtill poſſeſſing only as a creditor for payment of his principal ſum and annualrents that became due yearly, by the expreſs ſtipulation of parties, even after the expiry of the limited reverſion; and it was never heard, that a creditor could plead the benefit of a poſſeſſory judgment, that privilege being only competent to proprietors or tackſmen of land; and the benefit of it is, That the poſſeſſor muſt continue in the ſame ſtate, till his right is reduced: but, as to a creditor, his poſſeſſion muſt impute in payment of his debt; and, whenever that is done, his right evaniſhes, and he muſt yield the poſſeſſion. Indeed, if a declarator of irritancy had proceeded, the defender would have thereafter poſſeſſed as heritor, and thereby gained the irredeemable right of property, whereby he would have been intitled to the poſſeſſory judgment: but, while he poſſeſſed as creditor for ſecurity of his debt, it is abſurd to pretend he could thereby gain that privilege, more than he could the irredeemable right of property upon the poſitive preſcription; for both muſt go hand in hand, and where the one does not take place, it

is impoſſible that the other can. Surely he could not acquire an irredeemable right of property by the poſitive preſcription, as it would have been contrary to the very title of his poſſeſſion; of courſe, the poſſeſſory judgment cannot defend him.

2*dly*, As to the defence, with reſpect to the negative preſcription, it was *anſwered*: That the defender might have thereby loſt his right; but it was not tenable to plead the purſuer, who is proprietor, could loſe his property in that manner; eſpecially, as there is a great deal more here than an incorporate reverſion, the very title of the right being a ſecurity for payment of principal ſums and annualrents; ſo that, without the aid of the ſtatute 1617, the creditor's right would evaniſh whenever his debt was paid, and the reverſer's right become diſincumbered; therefore the queſtion here, is, Whether the proprietor can loſe his right of propriety, thro' not payment of a debt ſecured thereon for the ſpace of forty years? the very ſtating of which is abſurd. Neither can it vary the argument, That the reverſion was limited, and forty years run ſince the expiry of the term for redeeming; ſeeing it was competent, at any time before declarator, to offer payment of the ſums reſting: and, if theſe were paid before declarator, (which is the caſe here,) by the creditor's poſſeſſion, no declarator could ever be obtained, or was competent.

In ſhort, this paction is reprobate as much by our law, as it was by the civil, with this variation only, That we, to bring matters to a certainty, whether the wadſetter or reverſer ſhall have the property, allow the latter to redeem, by payment at any time before decreet; and, in caſe the wadſetter ſhall obtain a declarator, voiding the reverſion, then he becomes proprietor: but this is the effect of the judgment of Court, and the preſumed acquieſcence of the reverſer, by not offering payment before decreet is obtained. This being the caſe, it cannot be denied it is *meræ facultatis*, and purely in the debtor's option to pay any time before the declarator is extracted againſt him: our law has allowed him to be ſilent, till he is quickened by ſuch proceſs, and then, or never, he muſt take care to ſave his property.

Replied for the defender: Tho' no declarator for not redemption was ever obtained by the diſponee or his ſucceſſor, there appears plainly to have been the equivalent to that, by the proceſs and decreet of removing in the year 1705, obtained againſt the very perſon who was intitled to the reverſion, or to be reponed againſt the lapſe of time, and to plead that the ſame was ſtill redeemable, and offer the money in order to avoid being removed by the then purſuer as heritable proprietor of the ſubject, who, by that proceſs, did in as ſtrong terms aſſert his right to the ſame, as if he had libelled a declarator of irritancy; ſince a removing is certainly a ſtronger exerciſe of a right of property than a proceſs of mails and duties: and, as it muſt be allowed that a declarator would have forecloſed all future claims to the reverſion, it likewiſe proves, that the *pacta legis commiſſoriæ etiam in pignoribus*, are not abſolutely reprobated by our law, otherwiſe it could be no foundation of a declarator in order to forecloſe any after-redemption. In the *next* place, with reſpect to the argument, That the elapſe of forty years, ſince *Martinmaſs* 1695, is ſufficient to cut off the purſuer from any claim for relief, it was obſerved, That the irritancy is not *ipſo jure* void, but only purgeable *ex equitate* before declarator; and, if the omiſſion to purge before the extract of a decreet, would for ever forecloſe the diſponer from being reponed to the reverſion, which was

once

once forfeited by the terms of the clauſe itſelf, upon the lapſe of the time limited for it; the defender apprehends, that much more muſt that equitable claim of relief be cut off by the long preſcription of forty years, which is a much greater negligence on the part of the diſponer, and, by the general principles of law, ſerves to cut off all obligations and actions whatſoever; and therefore ſeems fully to ſupply the want of a declarator in favours of a diſponee: beſides, this remedy or relief the Court is in uſe to grant *ex equitate*, can never be ſtronger than any other perfect right which may be the ground of an action or reduction; and yet all theſe are cut off by the lapſe of time.

As to the negative preſcription on the ſtatute 1617, it is true, the ſame bears an exception of reverſions *in græmio*, or regiſtred apart; but that can afford no objection, ſeeing the act is plainly to be underſtood of perpetual reverſions, which being taken as *meræ facultatis*, are excepted from the preſcriptions in theſe two caſes: but this cannot be applied to a reverſion limited to a certain time, which, tho' it be *in græmio juris*, yet, upon the face of the right, it cannot appear otherwiſe than as it is expreſſed, that is, temporary, and, *ipſo jure*, periſhing by the lapſe of time, tho', *ex officio judicis*, the reverſer may be reponed; but this title to be reponed is then the only reverſion that remains, and, like all other actions or reverſions, muſt be ſubject to the negative preſcription.

Duplied for the purſuer: The decreet of removing can never ſupply the want of a declarator; ſince neither the nature of the action, nor the inferior judge, before whom it was carried on, was competent for that purpoſe; more eſpecially, as it might have been intented immediately after the date of the right; which demonſtrates, That it could ſtand in no ſtead of a declarator of irritancy of the reverſion. 'Tis true, the reverſer might have taken that opportunity of paying the money, but his circumſtances were then ſuch as he could not procure it; and therefore behoved to ſubmit to a removing; but that could not exclude him from paying at any time thereafter, and claiming his right before declarator was obtained.

The Lords found, That, in reſpect the reverſer or his ſucceſſors have not offered to redeem ſince the term of Martinmaſs 1695, *when, by paction, the right of reverſion was to become void, which is now more than forty years ago; and that the defender and his father have poſſeſſed the lands without quarrel, ever ſince the* 1705, *the right is now irredeemable.*

N° CIII. *November* 17. 1738.

Alexander Tennant of *Handaxwood*, contra *Murray* of *Meadowhead*, &c.

An Agreement, that the Heritors having Right to a Commonty, ſhall poſſeſs the ſame, each conform to a certain Number of ſoums, is the Rule in dividing it on the Act 1695.

IN the year 1663, ſeveral heritors having right to a commonty, entered into a contract, whereby they divided part thereof; but, as to the remainder

mainder, it was ſtipulate the ſame ſhould remain common amongſt all the parties; and that ilk one of them ſhould hold their proportional number and quantity of ſoums thereupon, as ſet forth in the agreement. *Alexander Tennant*, one of the heritors, brought a proceſs on the act 1695, againſt the others, for dividing the part that remained common.

The defence offered, was, That the Muir could not be divided on the above ſtatute; ſeeing, by the foreſaid contract, the ſame was already done by the then heritors of the circumjacent lands; ſo that any new diviſion upon that law would be to recede from that agreement, whereby a right, with conſent of all parties concerned, was acquired to each, and could not be taken from them.

Anſwered for the purſuer: The only deſign of the contract was to hinder the commonty from being overſtocked, and ſo rendered uſeleſs; and therefore it could be no bar to a diviſion on the act, eſpecially, as there are no words in it which ſhow the ſame was intended to ſtand as a perpetual rule amongſt the parties. Beſides, nothing was thereby ſettled, but a ſouming and rouming, which could never be called a diviſion, ſo as to anſwer the intention of the Legiſlature; and that it was material to obſerve, That a ſouming and rouming, by uſe and wont, confirmed by preſcription, is ſurely as ſtrong as when it begins by a written contract; and yet, it is believed, poſſeſſion in conſequence thereof would not be a good defence againſt the diviſion upon this act; therefore the contract can be no bar thereto, conform to the valued rent, the rule laid down in the ſtatute.

The Lords found the commonty in queſtion, ſo far as the ſame is not divided (otherwiſe than by ſouming and rouming,) falls ſo far under the act of Parliament, that either party may inſiſt to have the ſame divided in this proceſs; and therefore ſuſtained the purſuer's title; but found, That the rule of diviſion, in this caſe, muſt be by ſetting off a proportion of the commonty to each of the parties, effeiring to the ſoums, the ſeveral parties contractors have agreed to in the contract betwixt their authors and predeceſſors.

N° CIV. *November* 21. 1738.

Magiſtrates of *Montroſe*, contra *James Robertſon*, &c.

If a Father provide a Child, and failing it by Deceaſe, ſubſtitutes another, the Condition, ſi ſine liberis deceſſerit, *is implied.*

IN the year 1697, the Magiſtrates of *Montroſe* borrowed 200 merks from *David Robertſon*, for which they granted their bond, obliging themſelves, *&c.* to repay the ſaid ſum to him and his wife, for their liferent-uſe allenarly, and to *James*, *David*, *Alexander*, and *Iſobel Robertſons*, their lawful children, equally amongſt them in fee; and, in caſe of the deceaſe of any of them, that the ſame ſhould be equally divided amongſt the ſurviving bairns. *David Robertſon* and his ſons having died, *Iſobel*, *anno* 1721, claimed payment of the bond from the Magiſtrates, as her father's only ſurviving child, and, upon that account, having right

to

to the fee of the whole, in virtue of the foreſaid ſubſtitution. Accordingly, the Magiſtrates paid the bond, and took her diſcharge; after which, a proceſs was brought againſt them, *anno* 1735, at the inſtance of *James Robertſon* ſhipmaſter in St. *Andrews*, ſon to *James Robertſon*, one of the ſubſtitutes in the bond, who claimed payment of ſuch ſhare thereof as belonged to his father. After this, the purſuer went out of the country; and, the proceſs having fallen aſleep, the Magiſtrates, in order to bring the queſtion to a ſpeedy concluſion, brought a declarator to have it found, That the above diſcharge was a ſufficient exoneration of the debt to them.

Pled for *James:* Tho' by the above bond it was provided, That, upon the deceaſe of any of the fiars, their ſhare ſhall accreſce to the ſurviving bairns, yet the ſame could only be underſtood, in caſe they ſhall deceaſe without leaving children; therefore, ſo far as concerned his intereſt in the bond, the payment made to *Iſobel* was unwarrantable. In ſupport whereof, it was obſerved, That, where a father makes a proviſion in favours of a child, and, failing him by deceaſe, ſubſtitutes another perſon, or even another child, that, in ſuch a caſe, it is always underſtood that the ſubſtitution is only to take place, in caſe the inſtitute die without children, *ineſt conditio, ſi ſine liberis deceſſerit.* Nor is there any thing more agreeable to natural equity than for a father, when he gives a proviſion to a ſon, to give it, failing that ſon, to his children, as the only end and deſign he can have in giving thereof to his children, is to enable them to ſet out in the world, ſupport their families, and give proviſions to their children after them; a doctrine clearly founded in the principles of the civil law, as appears from *L.* 102. *De cond. et demonſt. L.* 6. *Cod. De inſt. et ſubſtit.* And likewiſe in our practice, as Lord *Stair* obſerves, *tit. Heirs*, with reſpect to the benefit of heirs, That they have right not only to obligements conceived in favours of the defunct and his heirs, but tho' there be no mention of heirs, unleſs, by the nature of the obligement, there be a ſpeciality appropriating them to the perſon of the defunct only, as commiſſions, truſt, *&c. January* 9. 1662. E. *Murray*; *February* 2. 1667, *Powrie*; *January* 6. 1670, *Innes.*

Pleaded for the Magiſtrates: That this queſtion depends on the import of the words, which fall to be explained according to their plain and obvious meaning, unleſs a good reaſon can be given for the contrary, and ſuch as can be ſuppoſed to enter into the mind of the defunct. Nor can the authorities of the civil law referred to have any weight with us; as theſe were merely poſitive conſtitutions, that only had force with them in certain caſes; particularly, where ſtrangers were ſubſtitute to children, *ne videatur teſtator alienas ſucceſſiones propriis anteponere. L.* 30. *Cod. De fidei-commiſſ.* which ſeems to have been the chief reaſon of this conſtruction, but cannot apply to the point in hand. Beſides, theſe even did not take place in favours of ſuch children as were exiſting when the ſubſtitution was made; becauſe they were underſtood to be purpoſely omitted, if not expreſsly ſubſtituted. Now, in the preſent caſe, the defender was born long before the grandfather's deceaſe; and, as he could not but have the ſubſtitution in his eye every time he looked into the bond, it is to be preſumed, That, if he had inclined to extend the ſame to his grandchild, it would have been done by ſome expreſs deed after the defender was born. In the *next* place, This queſtion cannot be governed by any of the principles of the civil law, as *James*, the ſubſtitute, died before his father *David*; whereby the defender, upon theſe principles, could have no claim

to any part of his grandfather's ſucceſſion. *Laſtly*, The purſuer's predeceſſors were *in bona fide* to pay the debt to the ſurviving ſubſtitute, when no other party appeared to interpell them. Neither did they know whether the predeceaſing ſubſtitutes had left any children or not; ſeeing none of them appeared to make any claim upon the bond for 14 years.

The Lords found, That James's *ſhare did deſcend to his children, notwithſtanding the ſubſtitution, &c.*

N° CIV. *November* 28. 1738.

Competition, *Iſaac Lawſon*, &c. with *Thomas Udney*, &c. Creditors of *Macdougal* of *Crichon*.

Does the Priority of a Citation and Decreet againſt an Heir cum beneficio, *give any Preference among the perſonal Creditors of a Defunct?*

Iſaac Lawſon, &c. being creditors, by perſonal bonds, to the deceas'd *Crichon*, intented a proceſs upon the paſſive titles againſt his eldeſt ſon, heir ſerved to him *cum beneficio*; the citations were dated in *May* and *June* 1735; and, in the *December* following, the defender was found liable to the extent of the value of the inventary, and decerned againſt *ſecundum vires inventarii*.

After this, in the years 1736 and 1737, *Udney*, and others, alſo perſonal creditors of *Crichon*, inſiſted in the like actions againſt the heir, who, in order to aſcertain the value of the ſubjects, *&c.* raiſed a declarator and multiple-poinding, in which the creditors were called to diſpute their preference.

For *Lawſon*, &c. it was *urged:* That they having cited and obtained decreet againſt the heir, before any ſtep of diligence whatſoever was uſed by the other creditors, they ought to be preferred to them. In ſupport whereof, it was obſerved, That, wherever creditors could not recover their whole payment, it was a rule in determining competitions amongſt them, That *vigilantibus jura ſubveniunt*; and, where they were in other reſpects in equal circumſtances, the priority of diligence determined the queſtion; the preference given to a firſt appryſing, poinding, arreſtment, confirmation by an executor-creditor, and firſt ſaſine, being all proofs of this propoſition; and the ſtatutory exceptions were a confirmation that ſuch was the rule of the common law. 2*do*, Where the competition is upon a particular ſubject, and which is affectable by the creditor's diligence, there the preference muſt depend upon their diligence againſt the ſubject; ſeeing no perſonal diligence againſt the debtor can have any direct influence in the competition, for this obvious reaſon, That the debtor is univerſally liable to each of the creditors, and no perſonal diligence uſed againſt him can make him more liable than he was by the original conſtitution of the debt; conſequently, ſuch perſonal diligence cannot work any prejudice to the other creditors, who, without any, have the debtor bound to pay their whole debts; and therefore, in ſuch a caſe, it is only ſuch diligence as affects the debtor's eſtate, real or perſonal, and which is the ſubject of competition amongſt the creditors, that can give a preference to one creditor before another. But, 3*tio*, where the debtor's obligation

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is limited, where he is liable to the whole creditors to a certain extent, and when he has paid that ſum, he is free from his obligation to the other creditors; and where, upon paying a certain ſum, he may liberate his eſtate, tho' of greater value; there the only diligence that can be uſed, is ſuch as is perſonal againſt the debtor; conſequently, it muſt be the only rule of determining the preference. To apply this to the point in hand, an heir *cum beneficio* is not univerſally liable to his predeceſſors creditors, he is only ſo to the extent of the inventary; and therefore there may be a competition upon his perſonal obligation: and, as he becomes free of this upon payment, and the diligence of creditors becomes thereby extinct; therefore their preference muſt depend upon their diligence perſonally againſt the heir; ſeeing it is upon his perſonal obligation to pay the value of the inventary, that their competition and preference can only be eſtabliſhed. As this doctrine ſeems to be founded in the nature of the thing, ſo it is agreeable to the genius of the common law, which we have followed, in the ſtatute 1695, allowing a ſervice by inventary; the rule whereof is laid down in *lib.* 22. § 4. *et ſeq. Cod. De jure delib.*; the words are, That heirs entering *cum beneficio, in tantum hereditariis creditoribus tenentur, in quantum res ſubſtantiæ ad eos devolutæ valent, et iis ſatisfacient qui primi veniunt creditores; et, ſi nihil reliquum eſt, poſteriores venientes repellantur:* from which, it is plain, the heir *cum beneficio* was bound to pay *primo venienti*, whereby he was free from the after creditors, who loſt their debts, unleſs they had from the defunct a real right in his eſtate; the conſequence of which was not that they could bring a claim againſt the heir who had paid the value of the inventary, but that upon a real right they had action againſt the perſonal creditors who had received the value: but, if thoſe that were negligent were but perſonal ones, there was no remedy, they neither had a claim againſt the heir, nor againſt the creditors who had been more timeous. In ſhort, the ſubject of the competition can only be the heir's perſonal obligation for the value of the heritage; and, as the only diligence for affecting this muſt be perſonal againſt the heir, the firſt citations muſt be ſuch diligence as ought to give them who uſed theſe a preference. Such appears alſo to be the law with reſpect to the preference of creditors, upon the value of a defunct's moveable eſtate confirmed by his executor; the ſimple citation of whom within ſix months, gives a preference to all thoſe who uſe no diligence in that time: but, ſuppoſing it were otherwiſe, and that the ſame rule held with reſpect to a citation given to an heir, yet here *Lawſon*, &c. have gone ſomewhat further, they have alſo obtained decreets againſt the heir; whereby, as their ſums don't exceed the value of the heritage, they have eſtabliſhed their right upon his obligation for the value, and this before any action was brought againſt him by their competitors; therefore he ought to have paid their debts; and his neglecting to do ſo ought not to prejudge them; but the caſe ſhould be conſidered as if they had actually received payment.

On the other hand, it was *argued* for *Udney*, &c.: That, by the ſtatute 1695, nothing more was introduced than a limitation of the ſeveral creditors of the defunct, to the extent of the value of the inventary, in a queſtion with the heir ſo ſerved, their claims being not thereby altered, but reſtricted; ſo that, if the ſubjects were exhauſted by real debts affecting the eſtate in the perſon of the defunct, the perſonal creditors could get nothing; and, if they were all of that claſs, then their reſpective debts fell to be abated proportionally to the deficiency of the fund

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for their payment; conſequently, decreet behoved to go againſt the heir for thoſe reſtricted debts, whereupon all manner of diligence might iſſue againſt him, whether for affecting his perſon or eſtate, heritable or moveable, as well the ſubjects of the inventary, which abſolutely belonged to the heir, as thoſe that pertained to him in his own proper right. Indeed, if he omits to ſiſt any of the perſonal creditors, they who firſt intent action may recover payment from him; in which caſe, thoſe who ſuperveen, will only have repetition from the other creditors proportionally, as theſe others, who have received more than a due ſhare of their debts compared with the value of the eſtate; therefore all the creditors who are in the field may recover decreet for their whole ſums, if the value of the inventary will anſwer, or proportionally to the extent of the ſame: hence it would ſeem that the firſt citations give no preference, and that decreets on the paſſive titles againſt the heir can only intitle the obtainers to ſue perſonal or real diligence againſt him, whereby they will be preferable upon the eſtate, according as they have affected the ſame, in like manner as if they were original creditors of the heir, which is exactly conform to the 22d law referred to, whereby, tho' the heir may ſafely pay to the firſt comer, whether creditor or legatee, they being always liable in repetition to the other creditors proportionally to their rights and preferences; yet it does not give the leaſt hint that a citation at the inſtance of one creditor could give him any advantage over the reſt who compeared with him in judgment while the ſubject is in the field. And it is a miſtake to ſay, That the citation of an executor within ſix months is preferable to one thereafter; ſeeing it is only payment upon decreet that can avail for an exoneration to the executor, or exclude the creditors who ſuperveen, as was lately determined in the queſtion betwixt *James Graham* and Mrs. *Murray*. Neither ought the argument drawn from the brocard, *jura vigilantibus ſubveniunt*, have any influence; ſeeing a vigilant creditor can have no more indulgence than the law allows him: one that throws his debtor into goal upon perſonal diligence, will not thereby have preference upon his eſtate; and much leſs then can a ſimple citation in a perſonal action have that effect. But there is one inſtance upon this head which defeats the very foundation of the plea of thoſe diligent creditors, it is the proviſion in the ſtatute 1661, That the creditors of a defunct ſhall be preferred to thoſe of the heir, providing they uſe diligence for affecting the ſame within three years of the debtor's death, and which, by practice, is underſtood of compleat diligence; a law which has received no variation from the act 1695; conſequently, it is abſurd to argue, That a ſimple citation, in a perſonal action againſt the heir, ſhall affect or exhauſt the heritage, in preference to others who have either not cited at all, or uſed poſterior citations.

The Lords found, That the creditors of the deceas'd Patrick Macdougal *of* Crichon *have no preference on account of the priority of the citations, or of the priority of the decreets of conſtitution.*

N° CV.

N° CV. *December* 5. 1738.

George Gordon, contra *Jean Pain*, and her Husband.

1. *Perſonal Execution cannot be awarded, during Marriage, againſt a Wife for a Fine, nor the* jus mariti *affectable therefore.* 2. Veritas convicii.

IN the proceſs of ſcandal, at *Gordon*'s inſtance, againſt *Jean Pain*, for having called him a baſe deceitful villain, and ſcoundrel, *&c.* The Commiſſar of *Dumfries*, upon a proof of the fact, fined her in *L.* 30 *Scots*, and aſſoilzied her huſband; ſhe ſuſpended on theſe grounds: 1*mo*, That the purſuer had laid a baſe contrivance for keeping her huſband away from a *Michaelmaſs* election of the Magiſtrates for the burgh of *Annan*, by ſending to acquaint him, that a friend of his was dying, whom he having immediately ſet out to ſee, four armed men gripped and kept him, till the election was over, which ſhe offered to prove, as a ſufficient excuſe for any opprobrious language ſhe had given him. 2*do*, The decreet was inept, being againſt a wife, *ſtante matrimonio*, for a ſum of money, who, having nothing of her own, cannot have a fine impoſed on her for her delict; and that it would be an inconſiſtency in law, to allow execution to paſs for levying ſuch fines during the marriage.

The Lords found, That perſonal execution could not go againſt the wife, ſtante matrimonio; *and that the goods in communion, or what fell under the* jus mariti, *were not affectable for the fine; and allowed a proof before anſwer of the huſband's being carried off.*

N° CVI. *December* 8. 1738.

Competition betwixt *John Menzies*, *Mary Menzies*, &c. and the Truſtees of *Thomas Menzies*.

A Bond, payable the firſt Term after the Granter's Deceaſe, with Annualrents during the not Payment and a Clauſe for Infeftment; is heritable, tho' the Creditor die before the Term, and conqueſt, tho' he was not infeft.

SIR *William Menzies* of *Gladeſtains* granted a bond of proviſion to his ſecond ſon *William*, wherein he obliged himſelf to pay to him, his heirs, executors, or aſſignies, the ſum of *L.* 500 *Sterling* at the firſt term of *Whitſunday* or *Martinmaſs* after his deceaſe, with annualrents during the not payment thereof, after the ſaid term of payment; and, for his further ſecurity, he obliged himſelf to infeft the ſaid *William* in an annualrent of *&c.* to take effect, and be payable to him, at the firſt term after the granter's deceaſe. *William* lived ſometime after the date of this bond, but died before his father, without taking infeftment: and, upon the deceaſe of both, a competition aroſe betwixt the executors, the

heir of line, and the heir of conqueſt of *William*, each pretending a right to the bond.

For *Mary Menzies*, *&c.* executors to *William*, it was *contended*: That, as by the practice of the Court, bonds bearing annualrent having always been held heritable, except in ſo far as it has been varied by the ſtatute 1661; ſo, by the ſame authority, it was eſtabliſhed, That, where a bond was conceived in ſuch a manner, that annualrents was not to run upon it, till after a certain term, previous thereto, the bond was to be held a moveable ſubject as to all reſpects whatſoever; and the reaſon of this was extremely analogous to the other; for, as the conſtitution of annualrents was underſtood to conſtitute the *feudum pecuniæ*, by making it to bear fruits *ad inſtar feudi*, which made the law rank them in the ſame claſs with land-fees, as to ſucceſſion: ſo, when no annualrent was due, nor begun to run, the ſum could not be conſidered in that view. It appeared to be intended by the creditor to be uplifted at the term of payment, and only in the event of failure of payment at that time, to be laid out upon intereſt; and therefore, if he ſhould happen to deceaſe in the *interim*, the nature of the bond behoved to be determined according to the ſtate it was in at the time of his death, which was moveable; and the ſtipulation of annualrent, upon the failure of payment, could make no variation, as depending upon the condition of an uncertain event. Nor has this rule been confined to the caſe where the proviſion of annualrent depended upon a perſonal obligation only, but alſo where there was an heritable ſecurity upon lands ſtipulated for it; as particularly *June* 15. 1627, *Nicolſon*; where it is obſervable, the ſtile is preciſely the ſame with that of the deed in queſtion, *mutatis mutandis*. And indeed, as our law then ſtood, there could be no reaſon for making a difference betwixt bonds which had, or had not an obligement to infeft; for, if they bore annualrent, they were as much heritable without ſuch a clauſe, as with it, the proviſion of annualrent had in all reſpects the ſame effects: and, if this was the caſe before the act 1661, it does not appear how that ſtatute can make any difference. Beſides, this very point was determined in *February* 1718, *Robert Fiſher*, where the Lords found a bond moveable before the term of payment, tho' containing a clauſe of infeftment. Now, to apply this to the tenor of the deed under conſideration, the obligation for payment of the principal ſum at Sir *William*'s deceaſe, is merely perſonal, to pay the ſum to his ſon, his heirs, executors, *&c.* at the firſt term after his death. Next follows a proviſion, That, in caſe of failure, he ſhall be bound to pay *L.* 100 of liquidate expences: thereafter, in the ſame event, he binds himſelf to pay the legal annualrent; and, for ſecurity thereof, there follows an obligement to infeft to take effect, only after his deceaſe; whereby it would ſeem that the obligation for payment of annualrent, to which the infeftment is acceſſory, is plainly conditional, and to take place allenarly in caſe of failure in paying the principal ſum.

Pled for *John Menzies*, the immediate younger brother: That, ſeeing *William* was not infeft, it was not conqueſt, but heritage, as is plain from our antient and only laws about conqueſt, *Quon. Attack. chap.* 88. where nothing is accounted ſuch, but *terræ*, *tenementa*, *feuda*; and the *cap.* 97. ſpeaking of the difference betwixt heritage and conqueſt, ſays, *Statutum eſt, quod conqueſtus cujuſlibet liberi hominis legittimi, qui moritur de ipſo ſaſitus ſine hærede de corpore ſuo, gradatim uſque ad primogenitum aſcendit, hæreditas vero deſcendit gradatim.* Here the defunct is ſuppoſed to be *ſaſitus*, to

to make the ſubject aſcend; ſo that even *terræ* would not aſcend, if the defunct was not ſeaſed therein; but, to make an heritable bond, upon which no infeftment followed, conqueſt, would be an extenſion of theſe ſtatutes, out of ſight of their words and meaning, yea, contrary to reaſon; as the heir of line has the *onus tutelæ*, and the burden of all debts, on which account he ſhould have the *commodum* alſo; conſequently, where the law has not expreſsly provided a ſubject to the heir of conqueſt, it ſhould go to the heir of line; but no law has provided any bonds, and far leſs heritable ones, upon which no infeftment has followed, to the heir of conqueſt; and for this reaſon it was the Lords found, That a bond ſecluding executors was not conqueſt in the ſenſe of law, and ſo fell to the heir of line, not the heir of conqueſt, *January* 23. 1706, *Begbie*; whereby the Court ſhowed they would deem nothing conqueſt but *terræ* or *feuda*, according to the expreſs ſtatute, at leaſt that conqueſt required an infeftment. It may be true, that an *annuus reditus* has been reckoned a *feudum*, as *Craig* obſerves: but then that ſame author, *lib.* 1. *tit.* 10. § 16, and 37. ſays, *Nihil enim feudi nomine dignamur, niſi id, de quo dici poteſt, quod N. obiit ultimo veſtitus et ſaſitus, de tali prædio et tenemento: tit. De feudo*; plainly declaring, That no ſubject was deemed a *feudum* or *tenementum* where the feuer was not *ſaſitus*. Neither is it ſurpriſing, that the being infeft or not infeft ſhould alter the ſucceſſion, there being ſeveral inſtances of this in law. See *Hope's Minor Pract. tit. Heirs.*

For the truſtees of *Thomas Menzies*, the elder brother and heir of conqueſt, it was *anſwered* to both theſe claims: *Firſt*, With regard to the plea for the executors, That the whole of the argument anent bonds being moveable or heritable before or after the term of payment, held ſoly in the caſe of thoſe that were *quaſi* heritable, in conſequence barely of their bearing annualrent after the term of payment; but it never was applied to ſuch as were properly, and *ex ſua natura*, heritable, by bearing an expreſs clauſe for infeftment in lands, or containing a clauſe expreſsly excluding executors; theſe were always conſidered as heritable from their date, without regard to the term of payment, or the term of commencement of annualrents, as appears from all our law books, *Stair*, *lib.* 2. *tit.* 1. § 4. and Sir *George Mackenzie*, *lib.* 2. *tit.* 2. § 5. and 6. the laſt of whom obſerves, "That all bonds for ſums of money ſhould be move-"able, and ſo belong to the executors, except either the executors were "ſecluded, or the debtor were expreſsly obliged to infeft the creditor." See likewiſe *Hope's Minor Pract.* § 104. and the 73d deciſion obſerved by *Newton*. From whence it is evident, That a bond which is heritable, as bearing a clauſe for infeftment, is abſolutely ſo *ab initio*; and that the creditor's dying before the term of payment, or annualrents becoming due, does not alter its nature. And, as to the deciſion *June* 16. 1627, *Nicolſon*, the obligement there to infeft was only conditional in caſe of not payment of the principal ſum at the term of payment, which is very different from this caſe; for Sir *William* here obliges himſelf preſently to infeft his ſon for his ſecurity in an annuity of &c. grants procuratory and precept for that purpoſe; and, by the procuratory, he, *de preſenti*, reſigns the ſaid annualrent: ſo that the infeftment in ſecurity might have been taken the next day, even tho' the term of payment was not come, which is very different from the caſe where the obligement to infeft is conditional, in the event of not payment at the term; as there

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no infeftment could be taken till that was paſt. And, as to the other deciſion in the 1718, the diſpute there was, Whether the bond was heritable or moveable *quoad debitorem?* but here the queſtion is *quoad creditorem*; and theſe two do not always reciprocate.

In the *next* place, as to the plea of the heir of line, That nothing is conqueſt but *terræ, &c.* it was *anſwered:* That our old laws in explaining the ſucceſſion in the conqueſt indeed mention only *terræ, tenementa*; becauſe theſe are more generally the ſubject of ſucceſſion, yet they no where ſay, That nothing is conqueſt but theſe: and all our lawyers agree that an *annuus reditus* is a *feudum* which either aſcends or deſcends, according as it was conqueſt or heritage. With reſpect to the quotation from the *Quon. Attack.* it proves nothing; for *ſaſitus* is only mentioned there as the common caſe; but it does not ſay, *ſaſitus* or not *ſaſitus* makes any difference. Beſides, that word cannot ſignify *ſeaſine*, as it was not in uſe for ſome hundreds of years after the book was wrote; and it would be abſurd, if one who had purchaſed lands happened to die not infeft, that that ſhould make any difference as to the rule of ſucceſſion. *Craig* ſays ſimply, *ſi feudum acquiſierit*, which holds whether the purchaſer die before or after he is infeft. *Stair, lib.* 3. *tit.* 5. § 10. *July* 7. 1675, *Robertſon.* As to the obſervation from *Craig*, That *nihil feudi nomine dignamur, &c.* it is only intended as a deſcription of a compleat feu; but he no where ſays, if one poſſeſſed of lands which he had acquired dies uninfeft, that the ſame would go to his heir of line, and not to his heir of conqueſt. Nor is it to the purpoſe, That bonds excluding executors go to the heir of line; as it is admitted that nothing is conqueſt but ſuch heritable rights as whereon infeftment may follow.

The Lords found, That the bond is heritable, and that the ſame does belong to the heir of conqueſt.

N° CVII. *Eodem Die.*

Elizabeth Young, contra Doctor *Arrot.*

A Siſter and Aunt to a Woman are admitted as Witneſſes cum nota, *in proving her Marriage, even tho' it is to be eſtabliſhed chiefly from Circumſtances.*

IN the proceſs at Mrs. *Young*'s inſtance againſt the Doctor, before the Commiſſars, for declaring her marriage with him; the libel conſiſted of two branches: 1*mo*, the actual ſolemnization. 2*do*, Their being habite and repute man and wife. Both which the purſuer was allowed to prove: in conſequence whereof, ſhe adduced her ſiſter and aunt as witneſſes for her, whom the Commiſſars admitted *cum nota*. Againſt this interlocutor, the Doctor preferred a bill of advocation on the following grounds: 1*ſt*, That women are not habile witneſſes, unleſs in particular caſes, where perhaps, from the nature of the thing, there is a *penuria teſtium*, and the truth cannot be diſcovered from others; but here there can be no *penuria*, ſince the purſuer does not pretend to bring the leaſt evidence of the actual ſolemnization, but reſts her proof allenarly on the habite

habite and repute, which abſolutely exclude ſuch a ſuppoſition; theſe terms plainly denoting, That the fact alledged is known not to a few people, but to a crowd or multitude of different perſons. 2*dly*, Theſe witneſſes ought to have been rejected, becauſe they ſtand in ſo near a relation to the purſuer; it being a fixed principle in law, That ſuch perſons are not to be admitted as witneſſes, becauſe, *ob animi affectionem, ſeu ſanguinis charitatem*, they are juſtly ſuſpected of partiality. It is true, that near relations are admitted in proving the real act or ceremony of marriage; becauſe it is preſumed ſuch only are called on that occaſion; but, in the caſe of habite and repute, there can be no ſuch preſumption.

Anſwered: If it is true, as is acknowledged, That near relations are always admitted to prove the actual ſolemnization, much more ought they to be received here, where it clearly appears all along by witneſſes, beyond exception, that it was intended by parties their behaviour as man and wife ſhould, for reaſons of conveniency, be concealed and not divulged for a ſeaſon; conſequently, it is impoſſible the matter can be proved otherwiſe than by ſuch witneſſes as were admitted into their ſecrets; more eſpecially, as it is not pretended that the proof ſhould reſt alone upon their evidence, but only that their teſtimonies may be brought in aid to concur with others who are unexceptionable, and whoſe depoſitions already emitted bear expreſs reference to the preſence and knowledge of the witneſſes now in queſtion: and the defender ſeems to miſtake the caſe, when he pretends, that the purſuer lays the ground of her proceſs upon habite and repute only; ſeeing the chief *medium* ſhe founds upon is commixtion and repeated formal declarations (of which ſeveral inſtances were condeſcended upon) acknowledging her to be his lawful wife, which is not only a preſumption, *juris et de jure*, of a previous actual marriage, but a conſent *de preſenti*, and ſo takes in all the requiſites thereof. It is certain, no ſet form of words is neceſſary or eſſential thereto, but that any deliberate conſent of parties to take one another is ſufficient to eſtabliſh that contract; eſpecially if commixtion follows, a circumſtance that ſhows their conſent was ſerious: ſo that it is not eaſy to comprehend why relations ought not to be admitted in the preſent caſe; in like manner, as where the marriage is gone about by ceremonial rites. Indeed, where ſuch a contract is endeavoured to be eſtabliſhed by habite and repute, or notoriety, and not from any actual declared conſent, there the law will be more ſcrupulous in admitting witneſſes; becauſe, in theſe queſtions, there can be no penury: but that does not apply to the point in hand.

The authorities quoted for the purſuer, were, *lib.* 4. *tit.* 18. *decret. greg.* 9. *Maſcardus de prob. vol.* 3. *con.* 1024. *Ant. Gabrielus lib.* 6. *concluſ.* 11. *Sanches De matr. lib.* 3. *diſp.* 71.

And, for the defender, 9th *February* 1709, *Forbes*; *Maſcard. De prob. concluſ.* 1024.; *Huber. tit. De teſt.*

The Lords refuſed the bill of advocation.

N° CVIII. *December* 19. 1738.

James Waddell, &c. contra *William Waddell.*

Conditional Legacy.

George Waddell of *Abovethehill* diſponed certain lands to *William Waddell* his brother, with the burden of 3000 merks to the children of *George Waddell* his nephew, to be divided amongſt them, according to the proportions therein ſpecified; and, amongſt the reſt, there was one in the following terms: *To George Waddell ſailor* 800 *merks, he coming home to receive the ſame.* The ſaid *George Waddell* (ſon to *George* the nephew,) to whom the ſum was left, outlived the deviſer, but died abroad; whereupon a proceſs was brought at the inſtance of his executors, againſt *William* for payment of the 800 merks.

Objected for the defender: That the legacy was conditional, *in caſe the legator came home to receive the ſame. Anſwered:* The meaning of theſe words was none other but the better to ſecure payment to *George*, that it might not be loſt by remitting it to him abroad; or perhaps it carried an admonition or invitation to him to come home. To illuſtrate which, the caſe was put, That the teſtator had ſaid with reſpect to this legacy, he granting a factory to receive the ſame. Surely his death before the factory was granted, would not have annulled the legacy, and no more ought his not coming home; ſeeing his executors in his right may ſtill receive it, conform to *L.* 85. *ff. De condit. et demonſt. L.* 48. *ff. De verb. obligat.*

Replied: The words of the clauſe are of the ſame import, as if it had ſaid to in caſe he come home to receive the ſame; for, in common ſenſe, as well as in law-language, the ablative put abſolutely has the force and effect of a condition; and the ſuppoſed caſe, That the teſtator had adjected to the legacy theſe words, he granting a factory to receive it, is no ways applicable to the preſent queſtion; ſeeing no other rational ſenſe could be put upon ſuch a clauſe than this, that the teſtator was willing it ſhould be paid to *George* his factor, tho' he continued abroad: but, in all caſes of this nature, reaſon and common ſenſe muſt be the guide, for explaining when a condition is underſtood to be meant, when not; and here no other meaning can be put on the words other than to imply a condition, the teſtator intended that his money ſhould not be carried out of the kingdom, and ſpent abroad, but to be enjoyed by the legator, in caſe he came home and lived among his friends: but, even if the intention was, as the purſuers alledge, the better to ſecure payment of the legacy, that it might not be loſt, or as an admonition to *George* to come home, ſtill theſe ſhow that the legacy was made conditional.

The Lords found, That the legacy to George Waddell *ſailor was conditional,* viz. *in caſe he came home to receive the ſame; and that he never having come home, the condition failed, and conſequently the legacy was not due.*

N° CIX.

N° CIX. *Eodem Die.*

Kenneth Urquhart, &c. Creditors, Arreſters of *William Douglaſs* of *Glenbervie*, contra *William Forbes* Truſtee for the ſaid *William Douglaſs*.

Are Moveables and Bonds aſſigned to one for his Aliment, and declared not to be affectable by his Creditors, arreſtable for the Aſſigny's debts prior to the Aſſignation?

Margaret Douglaſs diſponed to *Glenbervie* all her moveables, ſuch as houſhold-furniture, *&c.* in which ſhe alſo aſſigned him to certain bonds to the extent of about *L.* 3000 *Scots*, burdening him with the payment of ſome legacies; and likewiſe ſhe provided, "That any ſuper-"plus or benefit ariſing to *Glenbervie* from the ſaid diſpoſition, ſhould be "no ways areſtable or affectable by his creditors, any manner of way "whatſomever; but all right, benefit, and intereſt, that might, or could "accreſce to him by virtue of the right, ſhe provided to him after her "deceaſe, for his neceſſary aliment and ſubſiſtance allenarly."

After *Margaret Douglaſs*'s death, *Glenbervie* transferred the particular debts mentioned in the diſpoſition to *William Forbes*, as truſtee for himſelf, with proviſion to lay out the reſidue (after payment of the legacies,) upon ſecurity for his aliment in terms of the above clauſe.

However, ſome of *Glenbervie*'s creditors having arreſted the ſums in the debtors of the bonds their hands, inſiſted in a forthcoming; in which it was *pled* for *William Forbes* the truſtee, That, as to the reſidue, *Glenbervie* himſelf was preferable, in regard that by the deed in his favours the ſame was declared alimentary and unaffectable by his creditors, which was at leaſt good againſt all thoſe whoſe debts were prior to the diſpoſition.

Anſwered for the creditors-arreſters; That it was not in the deviſer's power to ſecure moveables, ſettled in the perſon of their debtor, from the diligence of his creditors; ſeeing the ſubjects were made his, and declared to belong to him, his heirs, executors, or aſſignies; and conſequently muſt be ſubject to arreſtments or diligence affecting the ſame at the ſuit of his creditors. No body doubts but a yearly ſum may be granted to one as alimentary, and made unaffectable by his creditors; in which caſe, *hæret oſſibus*, it is unaſſignable by the party for whoſe aliment it is deſtined; and, by the ſame rule, cannot be affected by arreſtments for his debts, ſince it is for his natural ſubſiſtance the grant is made; and conſequently muſt be ſubſervient to that purpoſe and no other. It is true, the nature of certain rights renders them alimentary, ſuch as ſervants fees, ſoldiers pay, ſalaries, or the like; but a right to a great eſtate, or large ſums of money, cannot be provided to one under that colour; for the law will lay open the ſubjects to the diligence of creditors, and void the fraudulent contrivance to diſappoint them, *pactis privatorum jure publico derogari nequeunt*; ſuch likewiſe is the doctrine taught us by *Stair*, *p.* 375. Hence it is plain that principal ſums cannot be eſtabliſhed as alimentary, or the *ipſa corpora* of moveables, it muſt be conſtitute as a yearly fund, to anſwer the intent of an aliment, and cannot exceed the meaſure of ſuch; therefore, as the

ſubjects

ſubjects here are made over *per averſionem*, they cannot ſubſiſt in *Glenbervie*'s perſon, unaffectable by his creditors.

Replied for the truſtee: The benefit, after payment of the legacies, and other burdens, which *Glenbervie* will get by the aſſignation, amounts to a mere trifle, ſuch as would ſcarce be a reaſonable aliment to him for one year, and, at moſt, only a moderate gratuity for the neceſſary trouble attending the management of the ſubject. In the *next* place, any perſon may grant a gift *ſub modo*, and with a quality, that will be effectual *contra communes juris regulas*: *e. g.* One may gift a ſum of money to a wife, which would fall under the *jus mariti*, conſequently affectable by his creditors; and yet this may be prevented by adding a quality thereto; for the will of the donor muſt always be the rule by which the gift is to be regulate; ſo that it muſt either take place as gifted, or be of no effect at all, *uti quiſque rei ſuæ legaſſet*, &c.

The Lords found, That the reſidue over payment of the legacies being declared to be alimentary and unaffectable by Glenbervie's *creditors, could not be affected by the purſuers arreſtments for a debt prior to the diſpoſition granted to him.*

N° CX. *December* 21. 1738.

Competition, Earl of *Aberdeen*, with the Creditors of *Scot* of *Blair*.

An Arreſtment does not fall by the Death of the Perſon in whoſe Hands it was laid, but may be made effectual if the ſubject is in medio.

THE Earl being creditor to *Scot* of *Blair*, uſed arreſtment in the hands of *William Blair* his ſon, and thereupon brought a forthcoming againſt him, in which ſome procedure was had; thereafter, *William* died, who being ſucceeded by *Hamilton Blair* his brother, the Earl inſiſted in a transference againſt him; in which compearance was made for the creditors of Mr. *Scot*, who produced an arreſtment uſed for them, in the hands of *Hamilton Blair*, after he ſucceeded to his brother; and objected, That the Earl's arreſtment periſhed by the death of *William*; ſo that no decreet of forthcoming could now follow thereon.

Anſwered for the Earl: There is no other legal method known by which a moveable debt can be taken in execution of a decreet, or applied in payment of a creditor, but by an arreſtment and proceſs of forthcoming founded thereon; and, if an arreſtment did import no more but a perſonal prohibition upon the debtor, it is not eaſily conceived how the perſonal prohibition, while it is not contemned, ſhould eſtabliſh a right in the arreſter. It is certain, an inhibition, which is but a perſonal prohibition, gives no action to the inhibitor, while it is not counteracted; conſequently, an arreſtment is not a ſimple prohibition upon the party, in whoſe hands it is uſed, to pay; but it muſt further give ſome right to the arreſter, which is the foundation of a forthcoming. With reſpect to the particular effects whereof, it was obſerved, That, as an arreſtment of a debt (which is the ſubject of the preſent queſtion,) gives the arreſter an action for payment;

ment; ſo it is equally certain, that a creditor cannot attain that end, without the intervention thereof: hence it would ſeem to follow, That the arreſtment is not a ſimple prohibition, which may be the foundation of a reduction, if it is contemned, but that it gives a right, ſince there is no inſtance in law where a petitory action is competent, but where there is a right upon which it is founded. 2*dly*, It is equally eſtabliſhed, an arreſtment gives a preferable right upon the debt arreſted by its priority, which is inconſiſtent with the ſuppoſition that it is only a perſonal prohibition, and eſtabliſhes no right in the arreſter: a perſonal prohibition, while it is ſubmitted to, can be no ſtronger than another perſonal prohibition made by the ſame authority at any after period: *e. g.* An inhibition uſed to-day, and one uſed ten years hence, if the debtor in the mean time neither ſells his lands nor incumbers them, will have the ſame effect againſt an alienation made after both. This demonſtrates that an arreſtment, which, from the moment it is laid on, gives an action, and a preference, is not a ſimple perſonal prohibition, but eſtabliſhes a right in the arreſter. But, 3*dly*, What puts the point beyond doubt, is, That, ſuppoſe a debt to be aſſigned, and the aſſignation not intimate, a creditor of the cedent's arreſting, will be preferred to the aſſigny, afterwards intimating his aſſignation. Now, if the arreſtment was but a prohibition, What colour could be aſſigned for this preference? 4*thly*, It is upon the ſame principles, That, if the debtor, for payment of whoſe debt the arreſtment was uſed, happen to die, and another creditor of his ſhould confirm the debt as executor-creditor, whereby, if the arreſtment were not in the caſe, he would denude the *hæreditas jacens*, and eſtabliſh the right in his perſon as effectually as if the debt had been aſſigned, and intimate in the defunct's lifetime; yet the arreſter is preferable, which it is impoſſible can be ſupported, if an arreſtment were but a perſonal prohibition; for the confirmation is no contempt, 'tis no deed, neither of the principal debtor, nor of him in whoſe hands the arreſtment was laid; 'tis but a ſtep of diligence allowed by the law to the co-creditor; but, when an arreſtment is conſidered as giving right and a preference, it follows, that the after-diligence of the executor-creditor cannot exclude it. And, if this is the caſe, That an arreſtment creates a right in the arreſter, 'tis not eaſy to be conceived upon what principles this right, and the action thence ariſing, ſhould become void by the death of the defender. 'Tis an eſtabliſhed rule, That penal actions don't tranſmit, unleſs after litiſconteſtation; but 'tis equally eſtabliſhed, That an action *rei perſecutoria*, is as competent againſt the heir as againſt his predeceſſor, and an action of forthcoming is in no ſenſe penal.

Replied for the creditors of Mr. *Scot*: The doctrine, That an arreſtment falls by the death of the perſon in whoſe hands it is uſed, is a point clearly eſtabliſhed by all our lawyers; particularly, Lord *Stair*, *lib.* 3. *tit.* 1. lays it down as a principle, "That arreſtment being a perſonal "prohibition, uſed againſt him in whoſe hands the arreſtment was made, "if he die, it is not extended to his ſucceſſors; but they may diſpoſe of "the goods or ſums arreſted, unleſs it be renewed in their hands in the "ſame manner as an inhibition, which is alſo a legal prohibition extend-"ing to heritable rights, as arreſtment doth to moveables; but, tho' the "debtor, whoſe goods or ſums were arreſted, die, the arreſtment ceaſeth "not, *&c.*" Where the learned author juſtly diſtinguiſhes betwixt the death of the common debtor, and the death of the perſon in whoſe

hands the arreſtment was uſed, the arreſtment does not periſh by the death of the one, becauſe it is not directed againſt him, but againſt the other, who is inhibited to pay what is in his hands, until the arreſter be ſatisfied; and ſo far it agrees with an inhibition, that it is a perſonal prohibition, but it differs in this, that the effect thereof does not ceaſe by the death of the common debtor; a diſtinction which ſeems to have been eſtabliſhed the 20th of *January* 1681, *Riddell*. Both of them are only perſonal diligences, but neither gives properly a right to the ſubjects belonging to the common debtors. Heritages are only carried by adjudication, and inhibition is calculated ſoly for preventing alienation: in the ſame manner, arreſtment is allowed to prevent the common debtor from running off with his effects, before they can be decerned to belong to his creditors: ſo that the forthcoming is nothing elſe but an adjudication *in mobilibus*, and the arreſtment, the *interim* remedy, anſwering the end in moveables, that an inhibition does in heritage; nor is there any reaſon for giving it a ſtronger effect than what is allowed to the other. This doctrine is likewiſe laid down by ſeveral other lawyers, and not a little confirmed from this conſideration, That it does not appear ever the point was ſo much as debated. As to the argument urged for the Earl, That an arreſtment muſt be ſomething elſe than a perſonal prohibition, it was *anſwered*, A ſecond arreſter is preferable to the firſt, if he obtain the firſt decreet of forthcoming, which is incompatible with the Earl's plea; and, if an arreſtment gave any right, ſuch as a decreet of adjudication or forthcoming, there is no reaſon why it ſhould preſcribe ſooner than forty years: neither is it inconſiſtent with the notion of an arreſtment's being only a perſonal prohibition, that they are preferred according to their dates; for, ſuppoſe one is laid on to day, and another half a year after, and both arreſters are inſiſting for a decreet of forthcoming, is it not agreeable that in *pari caſu* he who uſed the firſt diligence ſhould be preferred? And there is this good ground for preferring the firſt arreſter, That it was his diligence which preſerved the ſubject *in medio*, otherwiſe the common debtor might have got payment from his debtor during the half year that interveened betwixt the date of the firſt and ſecond arreſtment: it is likewiſe conſiſtent with this doctrine, that arreſtments are preferred conform to their dates, in a competition with aſſignies, according to the dates of the intimations of their aſſignation; for an aſſignation to a perſonal debt being only a perſonal right, the cedent's debtor is not obliged to know of any private aſſignation the cedent has made, until it be intimate to him; and therefore, until then, he may *bona fide* pay the old creditor, who, till the intimation, is conſidered as the proper creditor. An arreſtment has the ſame effect, namely, to put the common debtor's debtor in *mala fide* to pay him; but then, that an arreſter is preferred to a prior aſſigny, who only intimates his aſſignation after the arreſtment, ſeems to have been wiſely introduced by our law to prevent the hazard that there was of antidating ſuch latent deeds. And, *laſtly*, As to the obſervation, That an arreſtment is preferred to an executor-creditor confirming the debt, it was *anſwered*, The preſent queſtion is only, whether it periſhes by the death of him in whoſe hands it was laid on, ſeeing it is admitted the common debtor's death does not alter the caſe? for, as he is only called for his intereſt, the calling his ſucceſſor is ſufficient; and, as the inchoat diligence againſt the perſon in whoſe hands the arreſtment is uſed, may be thus carried on; the arreſter will be preferred to the other creditors of the common debtor, who ſhall confirm the ſubject; becauſe

cauſe that is only a new ſtep of diligence for affecting their debtor's means; and, as his death does not alter the arreſter's diligence, the executor-creditors can be in no better caſe after their debtor's deceaſe, than they would have been in by uſing a ſecond arreſtment; in order to affect their debtor's means, in caſe he had been alive; for the ſums arreſted are indeed in *bonis defuncti*, but affected by a prior arreſtment that is not altered by the common debtor's death; whereas, from its nature as a perſonal prohibition, it periſhes with the perſon in whoſe hands the arreſtment was uſed, he alone being perſonally inhibited thereby.

The Lords found, That the arreſtment does not die with the perſon in whoſe hands it was uſed, but may be made effectual againſt his heir by a forthcoming, the ſubject being in medio.

N° CXI. *December* 22. 1738.

Competition, *John Nielſon*, &c. with *Murray* of *Brughton*, &c. Creditors of *John Gordon* of *Kirkonnel*.

If a common Debtor grants ſeveral Infeftments on his eſtate before he is infeft, and thereafter takes infeftment, his Creditors muſt be ranked thereon according to the Priority of the Dates of their Infeftments.

IN the ranking of the creditors of *Kirkonnel*, *Gordon*, the common debtor having granted ſeveral infeftments before he was infeft, the queſtion occurred, Whether his infeftment would bring them in all *pari paſſu*, or if it would accreſce to prefer the creditors according to the dates of their infeftments?

For *John Nielſon*, and thoſe who had the firſt infeftments upon the eſtate, it was *argued:* That, ſo ſoon as the common debtor was infeft, the ſame behoved to accreſce to them, each in their order, in the ſame way as if he had been infeft before granting any of the precepts; to make out this, it was neceſſary to examine the nature of the *jus ſuperveniens*, and what effect is given to it in law. One diſpones an eſtate of which he is not proprietor, and the purchaſer ſtands infeft, thereafter the ſeller acquires a compleat title to the ſubject: our law ſays that there is no neceſſity for a ſecond diſpoſition; nor indeed ſeems there to be, from the nature of the thing; the purchaſer has the conſent of the proprietor formally interpoſed; the ſubject is delivered to him, and this is all that is neceſſary to transfer dominion. If then there is no neceſſity of a ſecond diſpoſition and infeftment, after the common author has acquired the right himſelf, which cannot be diſputed, otherwiſe their would be no ſuch thing as *jus ſuperveniens*; it follows, that the creditor firſt infeft muſt be preferred; becauſe *quoad* the common author, who cannot plead the defect of his own right, the creditor's infeftment is unexceptionable *a principio*. The common author thereafter can no more effectually deprive the firſt creditor of his poſſeſſion, and deliver the ſubject to another, than if the property had been his before granting the firſt infeftment; and the ſecond creditor, who has nothing to plead but upon ſuppoſition that the common author is proprietor, cannot object againſt the firſt creditor's right,

right, derived from the ſame author. In a word, whether the common author's title, at the date of the infeftments flowing from him, was unexceptionable or not, or if he had no title at all, is all the ſame thing with reſpect to rights derived from him; the creditor who gets the firſt infeftment, tho' he may be unſecure as to third parties, is abſolutely ſecure with regard to his author, and all thoſe deriving right from him.

The preſent queſtion is a competition among creditors; but let us ſuppoſe it were a competition among purchaſers, who had each of them got an abſolute diſpoſition with infeftment to the ſame ſubject from the common author, the ſame rules muſt govern that caſe; for, if they were to be preferred *pari paſſu*, the ſubject behoved to be found a commonty, or common property, which would never go down. See *L.* 72. *rei vind.*; *Stair, tit. Diſpoſit.* § 2.; 16th *January*, 1663, tenants of *Kilibattan*.

For *Murray* of *Brughton*, &c. it was *contended:* That all the competing infeftments being null, until the common author was infeft, they could only be validate the moment of his infeftment, and could only be effectual from its date; ſo that they muſt all come in *pari paſſu*, as if one infeftment had been taken for the whole; ſeeing the whole were void in the ſame manner as if *Gordon* had no title to the eſtate, it not being eaſy to conceive how his infeftment could operate *retro* in favours of the firſt infeftment, all the interveening ones being ſo many mid-impediments to the retroactive virtue of his. By the operation of the law, a right ſuperveening in the author's perſon accrues to his ſingular ſucceſſor, to whom he had diſponed with abſolute warrandice, of which there is no doubt, when the queſtion occurs betwixt the author and one ſingular ſucceſſor; but, where he had diſponed the ſame ſubject to different perſons, for onerous cauſes, he is equally liable to all of them to make it good; and the abſolute warrandice, competent to the firſt, being merely perſonal, cannot be more effectual toward conſtituting the real right, or accretion of the ſame, than that which is competent to the ſecond; the title of both is void, as a real right, and, when conſidered as a perſonal one, inferring an obligation upon the author to make good the real right, both are upon a level. It is impoſſible to imagine that the common author, before he was veſted, could be denuded; or that a real right could be conſtitute, before he had any himſelf: ſo that, to ſuppoſe the other creditors infeftments good from their date, were *filius ante patrem*; conſequently, it ſeems abſurd that any infeftment flowing from *Gordon* can be effectual, of a date prior to his own; of courſe, they muſt all be preferred equally, as if granted of the very date of the common author's infeftment. See *L.* 11. § 2. *De pign. et hypoth. Voet. tit. qui pot. in pign. Stair, p.* 381.

The Lords found, That the creditors ought to be ranked according to the priority of the dates of their infeftments, notwithſtanding that their author was not infeft.

N° CXII.

N° CXII. *January* 10. 1739.

Brown of *Cairntown*, and *Colvill* of *Brunton*, contra *Gardner* of *Northtarrie*.

One may accede by Facts and Deeds to a Submiſſion betwixt others, reſpecting Land-rights, without ſigning the ſame.

Northtarrie having incloſed a piece of muir, which his two neighbours, *Cairntown* and *Brunton*, alledged they had been immemorially in uſe to paſture, he, in order to ſettle their differences, wrote a letter to both of them, ſignifying, that the propereſt way to adjuſt their marches, was to refer the affair to an arbiter, whom he named. To this *Cairntown* returned an anſwer, declaring he was pleaſed with the propoſal, and that he had likewiſe ſpoke to *Colvill* about it, who agreed to the ſame; in conſequence whereof, the arbiter came to the ground, and aſked the parties, if they had agreed to the ſubmiſſion? to which all the three anſwered, That they had bound themſelves by mutual letters to ſtand to his determination, touching the marches and boundaries referred to him; whereupon the arbiter took the depoſitions of the witneſſes adduced for each of them, and thereafter pronounced his decreet-arbitral, finding *Cairntown* and *Brunton* had a right to paſture on the muir, and ordaining *Northtarrie* to open a paſſage in his dyke, in order that they ſhould have acceſs thereto; after which, a decreet having been likewiſe obtained before the Sheriff againſt *Northtarrie*, to implement the decreet-arbitral, he ſuſpended, inſiſting, amongſt other grounds, on this objection, That the decreet-arbitral was void, as *Colvill*, one of the parties, had not ſigned the letter agreeing to ſubmit; ſo that it could be conſidered, with regard to him, in no other view than a verbal ſubmiſſion.

The Lords ſuſtained the Objection againſt the decreet-arbitral in queſtion, that it proceeded upon a verbal ſubmiſſion, as to the right of lands, in ſo far as concerned Thomas Colvill, *one of the parties; and therefore is null.*

But, upon a reclaiming petition, and anſwers, *the Lords found the decreet-arbitral was binding upon* Thomas Colvill, *in reſpect of his compearing and adducing witneſſes before the Arbiter.*

N° CXIII. *February* 2. 1739.

Competition, *Daniel Forbes* with *Alexander Innes.*

A Sum due by promiſſory Note is arreſtable, tho' it is indorſed for Value.

Patrick Crawfurd merchant in *Edinburgh*, granted a promiſſory note to *Robert Gordon*, payable to him or his order, which came, by progreſs, in virtue of indorſations for value, into the hands of *Daniel Forbes*; and Mr. *Innes* being creditor to *Gordon*, arreſted the ſame in Mr. *Crawfurd*'s hands; whereupon a competition enſued betwixt them.

It was *pled* for *Daniel Forbes*: That it was a privilege, amongſt others, competent to bills of exchange, That ſums due thereby could not be arreſted for the debt of the perſon to whom they were payable in prejudice of the indorſee, and which obtained with us, becauſe the ſums were not, by the form of the writing, payable ſimply to the original creditor, but to him, or his order; ſo that the debtor, by any ſuch writing, could not, with certainty, know to whom he was debtor, until the bill did appear; and conſequently, till that time, no arreſtment could affect the ſums thereby due, without deſtroying the nature of theſe writings, and introducing confuſion in trade. It is true, that the note in queſtion (if the form is only to be conſidered,) is not properly a bill of exchange, as indeed neither are our inland-bills or precepts; yet, in reality, it is of the ſame import; it is an obligation payable to a creditor, or his order, which paſſes from hand to hand by indorſation; ſo that the debtor does not, the next moment after it is out of his hand, know who is his creditor, the laſt of twenty indorſees being the perſon, perhaps, who will make the firſt demand: and, if it be granted, which cannot be denied, that ſuch notes paſs by indorſation, it muſt be a neceſſary conſequence that the money therein contained is not arreſtable for the debt of the perſon whoſe name ſtands in the note, no more than for the debt of any indorſee who may have purchaſed the ſame for value; and, as we have conformed ourſelves to the law of nations, with reſpect to the indorſations of promiſſory notes, as well as bills of exchange, there is no reaſon why we ſhould not allow the ſame privileges to the one, as well as the other.

Anſwered for the arreſter: It has always been underſtood, that the privileges of being exeemed from compenſation, arreſtments, and, generally, every other clog, except what appeared upon the bill itſelf, was only the privilege of bills; and, in ſeveral deciſions, theſe privileges have been denied to promiſſory notes, for this reaſon, that they are not bills of exchange: ſo that now the nature of promiſſory notes is generally believed to be ſettled on the ſame footing as any other obligation. And it is a miſtake to ſay, That the courſe of trade requires the extending the privileges of promiſſory notes; ſeeing commerce, betwixt one nation and another, is not carried on by theſe. It is true, a great deal of inland buſineſs is carried on in that manner; yet conſuetude, in the caſe of an inland trade, is not of the ſame force to overturn the ſtanding law, as an univerſal cuſtom in foreign dealings; for foreign trade muſt be regulated by the general practice which conſtitutes what is called the law

of

of nations, and to which the municipal law muſt conform; but, where ſubjects of the ſame country deal together, they being ſubject to the municipal law, ought not to be favoured in debording from the known eſtabliſhed rules; hence it is, that bills are intitled to many privileges, which no other form of obligation in uſe amongſt the ſubjects of this country are intitled to, but which ought not to be extended to any other writing.

The Lords preferred the arreſter.

N° CXIV. *February* 8. 1739.

Helen, Archibald, &c. *Douglaſſes,* againſt Sir *John Douglaſs* of *Killhead.*

Action for Aliment, at the Inſtance of younger Children againſt their elder Brother.

SIR *William Douglaſs* having died without making any proviſion in favours of his younger children, they intented an action againſt Sir *John*, their elder brother, for aliment, upon this ground, That he poſſeſſed an opulent fortune (about 500 a-year,) deſcended to him from their common father. In ſupport of this, it was obſerved for the purſuers, That the defender, as heir to his father in ſuch an eſtate, is obliged to aliment them, in like manner as the father was, conform to 24th of *January* 1663, *Wederly*; 8th of *January* 1663, Lady *Otter*; which proceeded on this principle, That the obligation to aliment, which lay on the defunct, does deſcend againſt his heirs, and is competent to majors as well as minors, as the Court always found; particularly, 25th *July* 1705, *Aiton*; when it appeared ſuch were not in a condition to aliment themſelves, which is the caſe of all the purſuers in this proceſs; and therefore action ought to be ſuſtained for aliment bygone, ſince the father's deceaſe, and in time coming, until they ſhould be able to provide for themſelves. Neither can it afford any objection, that the purſuers have been maintained part of the time ſince their father's deceaſe by their friends, as the favour was not intended to be done to the defender; conſequently, the benefit thereof ought not to accreſce to him.

Pled for the defender: He did not controvert but brothers, ſucceeding to the eſtate of a common father, are by law bound to aliment their younger brothers and ſiſters; but then that obligation laſts only till majority. A father is bound not only to aliment his children, but to educate them to ſome calling, in order to put them in the way of maintaining themſelves; if he does not do this, he will be bound for aliment, even after majority, becauſe of his neglect; but a brother is under no ſuch obligation, he is not bound to put his brothers and ſiſters to apprenticeſhips, or to give portions to his ſiſters; and therefore, if, after majority, they are not infirm, their elder brother may be called cruel, if he leaves them to ſtarve, but there is no law to compell him to aliment them further. 2*do*, Admitting he is liable for the purſuers aliment till majority, unleſs he has no other defence, he further ſays, That perſons liable in aliments are to be taken in a certain order; firſt, the father, *Juper jure naturæ*; and, if he is indigent,

digent, the mother is bound to maintain the children, if ſhe be in a condition, which ariſes likewiſe from the law of nature, and, by the civil law, grandfathers and grandmothers; beyond this, aliments are not due *ſuper jure naturæ:* a brother is bound in conſcience to maintain his brothers, to which duty the law has added a poſitive command; but the obligation does not ariſe from the ſame ſource, becauſe a brother has no hand in bringing his brother into the world, it ariſes ſingly from filial duty, by which a ſon, in reverence to his parents, ought not to ſuffer their children to ſtarve; a brother then being purſued in a proceſs like this, has a ſort of *beneficium ordinis*, if not *diſcuſſionis*, that, if he can point out one liable in aliment by the law of nature, and able, he can only be liable *in ſuo ordine:* now, Lady *Douglaſs*, their mother, is able, ſhe having 2000 merks *per annum* of jointure off the defender, and *L.* 150 yearly more, in property.

The Lords found the defender, Sir John Douglaſs *having ſucceeded to his father in a conſiderable eſtate, is primary liable to aliment his younger brothers and ſiſters unprovided; and found the males have no claim to be alimented by their brother after majority; but that the females are intitled to be alimented till marriage; and found, That, in ſo far as they have been alimented by their friends, they have no claim againſt their brother.*

N° CXV. *February* 14. 1739.

Henry Sidney of *London*, againſt Sir *Robert Maxwell.*

1. *Objection to Deeds granted by a Papiſt on the 26th act* 1695. 2. Engliſh *promiſſory Notes and bills, payable on Demand, do not bear Annualrent until the Demand is made by proteſting.* &c.

Sidney having right to a bill and three promiſſory notes granted in *England*, by Sir *George Maxwell* of *Orchardtown*, to *Moriſon* of *Preſtongrange*, upon which adjudication had been laid againſt the eſtate of *Orchardtown*, after Sir *George*'s death, brought a proceſs of maills and duties, in order to obtain poſſeſſion. Againſt which, it was *objected*, That Sir *George* being Popiſh, the granting the deeds was in prejudice of his Proteſtant heir, as tending to carry off the eſtate from him, contrary to the above act of Parliament; and, altho' they bear value received, yet, by that law, they are held gratuitous, unleſs the granter declare the ſame were for value.

Anſwered: The *Scots* act cannot regulate deeds done in *England*. 2*do*, It only concerns gratuitous deeds, or diſpoſitions in prejudice of their apparent heirs, and the benefit they may have by ſucceſſion to the ſaid Popiſh perſons; but neither the words, nor intention thereof, interdict Papiſts from trade or commerce, or from borrowing of money, and contracting debt.

Replied to the *firſt: Quoad* the ſolemnities of writs, the *locus contractus* is the rule; and, if the uſual ſolemnities of the place where the deed is execute be adhibite, it will be probative *ex comitate* every where; upon which foundation it is, that promiſſory notes, granted in *England*, are

are probative here; but, with reſpect to the quality of the perſon, his capacity to diſpoſe of his real eſtate, the laws of the country where it is ſituate is the only rule, wherever the party himſelf may happen to ſojourn or reſide, there is no place for what the Doctors call *comitas in ſtatutis perſonalibus*, eſpecially where ſuch laws are prohibitory; ſurely it would be abſurd to ſuppoſe a *Scots* Papiſt could get free of the act by going abroad, and what the defenders now plead for is ſupported by analogy: thus, an eſtate in *Scotland* cannot be diſpoſed of on deathbed, altho' the deed ſhould be execute in *England* or *Holland*, where no ſuch law obtains.

In the *next* place, it was *objected:* That the adjudication is void, as being led for annualrents of the bill and promiſſory notes, bearing to be payable on demand, and no evidence, by proteſt or otherwiſe, that any demand was made in Sir *George*'s lifetime.

Anſwered: Tho' there is no ſtatute enacting, That promiſſory notes ſhall bear intereſt, yet, by the act 3*tio et quarto Annæ*, which extends the privilege of inland bills to promiſſory notes, it is declared, That, in any action thereon, the plaintiff ſhall recover his damage and coſts of ſuit, in which damage is always included the intereſt of the value acknowledged to be received by the note, in the ſame way as in bonds, for double of the ſums received, wherein no intereſt is covenanted for; and, altho' the notes be payable on demand, there was no need to make any, as they bear value received; becauſe it is the debtor's being poſſeſſed of the money, and the creditor's wanting the uſe of it, that gives riſe to the damage.

Replied: By the foreſaid act of Queen *Ann*, it is apparent, that inland bills don't bear annualrent, unleſs proteſted within the time limited; therefore this bill, which was never proteſted, cannot bear annualrent, and much leſs can the promiſſory notes, which, at moſt, are but in the caſe of inland bills, bear any intereſt, ſince they never were proteſted: but it was unneceſſary to enlarge on this head; ſeeing the Lords had the ſame queſtion under their conſideration this Seſſion, in the caſe *Murrays* contra *Murrays*; where they found that an *Engliſh* promiſſory note, not proteſted, did not bear annualrent.

The Lords repelled the objection of Sir George's *being Papiſt; and, as to the* pluris petitio, *they found, That the intereſt before the citation was not due; and therefore muſt be ſtruck off.*

N° CXVI. *February* 21. 1739.

David Clelland Painter in *Edinburgh*, contra *Stewart James Mackenzie* of *Roſehall.*

Servitude, how it may be conſtituted.

Robert Cunningham of *Anchinharvie* being proprietor of a houſe and yard in *Edinburgh*, did, in the year 1677, diſpone part of the houſe to Sir *George Mackenzie* of *Roſehall*, whereupon he was infeft that year.

Anno 1681, *Anchinharvie* diſponed that part of the houſe and yard which he had reſerved to himſelf to *James Gray* of *Warriſton*, and *Elizabeth Cunningham* his ſpouſe, in liferent, and to *Robert Gray* their ſecond

ſon, in fee, but with a ſervitude upon the foreſaid yard, in favours of Sir *George Mackenzie*'s lodging; which, by a marginal note in the diſpoſition, was conceived in the following terms, *viz.* "And it is hereby ſpecially "provided, That it ſhall not be leſome to the ſaid *James Gray* and his "foreſaids to build upon the yard of the ſaid houſe, in prejudice of the "lights of the ſaid Sir *George Mackenzie*'s gallery."

Upon this conveyance, *Elizabeth Cunningham*, and her ſon *Robert Gray*, obtained a charter from the Magiſtrates, *anno* 1692, wherein the ſervitude was expreſſed in the following terms, *viz. Cum ſervitudine ſuper dictum hortum non ædificandi, nec luminibus porticus dicti Domini Georgii Mackenzie officiendi.* And this clauſe was repeated in the two different ſaſines following thereon, in favours of *Robert Gray*, the one in the 1692, and the other in the 1705. *Robert Gray*, in the year 1710, diſponed his part of the ſaid tenement to one *Donaldſon*, who thereupon was infeft baſe; and from him it thereafter paſſed into different hands, until it was conveyed to *David Clelland*; but none of theſe conveyances, from the 1710, made any mention of the ſervitude. *Clelland*, apprehending that, by the ſtate of his rights, nothing elſe was intended but a ſervitude, *ne luminibus officiatur*, prepared materials for building a little houſe or tofall in the ſaid area, which he alledged would not prejudge the lights of the dominant tenement; but, before he began to build, he was ſtopt by a ſuſpenſion, obtained by *Stewart James Mackenzie*, to whom Sir *George*'s part of the houſe belonged.

For the ſuſpender it was *argued:* That a real ſervitude may be conſtituted by any writ granted by the proprietor of the ſervient tenement; and, if poſſeſſion follow, it will be effectual againſt all the ſucceeding proprietors thereof: ſo that, if *Auchinharvie*, or his ſucceſſor *Gray* of *Warriſton*, had granted an obligation to Sir *George* not to build upon the yard in queſtion, nor to prejudice his lights; and, had poſſeſſion followed, the ſervitude would have been effectual. *2do*, It is as ſtrong and unexceptionable a method of eſtabliſhing ſuch ſervitude as any, to ingroſs it in the infeftments of the ſervient tenement; ſeeing, in ſuch a caſe, neither the proprietor, nor any purchaſer from him, can miſken the ſervitude with which his right is burdened; and there can be no doubt of its being real, when it is a quality of his feudal right to the ſervient tenement. Nor can it create any difficulty, that the diſpoſition by *Auchinharvie* to *Warriſton* contains only a ſervitude not to prejudice the lights of Sir *George*'s gallery; and that the charter contains one more extenſive, *ſcil. non ædificandi*; ſince it would be new to maintain, that a burden could not be impoſed upon the vaſſal's right, which he was not formerly ſubjected to, without a ſeparate antecedent warrant in writ. No doubt, the vaſſal is not bound to accept of a new charter, diſconform to his former rights, as the law has given him remedies to compell the ſuperior to grant him charters agreeable to his former infeftments; but, if the vaſſal agree to accept of a new charter, with greater burdens than were contained in the former, he is tied thereby, and his accepting thereof in that manner is a legal proof of ſuch agreement, as much as if he had ſubſcribed the charter, which is underſtood to be a mutual contract, whereby both the vaſſal and ſuperior are bound: nor can the vaſſal otherwiſe get the better of thoſe burdens, than he could get free of the obligations he had come under in a mutual contract, by proving fraud, force, error, *&c.* Are not the preſtations upon the vaſſal every day changed at the renovation of their charters, additional feu-

feu-duties, and other burdens impoſed? And, did ever any body dream that ſuch clauſes were reducible, becauſe they were not contained in the procuratory, or other warrants upon which the charter proceeded? Such doctrine would produce many bad conſequences both to the ſuperior and vaſſal; wherefore, as *Elizabeth Cunningham* and her ſon accepted of a charter, ſubjecting their tenement to the ſervitude therein mentioned, neither to build upon the yard, nor to prejudge the lights of the ſuſpender's tenement, it muſt bind them, ſuppoſe, by the former rights, no ſuch ſervitude was conſtitute.

Neither can it afford any objection, That poſſeſſion has been had by ſubſequent conveyances, wherein no mention is made of the ſaid ſervitude; for, as it was once regularly conſtitute by *Robert Gray*'s infeftments, he could not, in the 1710, diſcharge his tenement thereof; nor could he lawfully convey the ſame, as freed of the ſervitude, to *Donaldſon*; and this muſt hold the more forcibly, as it became a quality of his feudal right to the yard which could not but be known to his ſucceſſors. Beſides, it would be a ſhort way of extinguiſhing real ſervitudes, if the proprietor of the ſervient tenement could free it by a conveyance, without expreſſing the ſame. *2dly*, The right to the houſe ſtill reſts on *Gray*'s infeftment, which expreſsly contains the ſervitude in queſtion (there being none other poſterior thereto, but the baſe one in favours of *Donaldſon:*) ſo that the charger cannot come at a public infeftment from the town of *Edinburgh*, but under *Gray*'s infeftment, and they are not bound to grant one to him, otherwiſe than in terms of *Gray* his author's right.

Anſwered for the charger: That, by our law, there are two ways of conſtituting a ſervitude, *viz.* either by preſcription, or the conſent of the proprietor. In the preſent caſe, preſcription cannot be alledged, ſince, from the rights above ſtated, the charger and his authors have poſſeſſed for theſe thirty years paſt, in virtue of titles, in which there is no mention of this ſervitude; and indeed, by the nature of the thing, as it conſiſts in *non faciendo*, it cannot be conſtitute by preſcription alone; ſince it is a rule laid down by all lawyers, That, where a perſon has a right to an area, he may build thereon at any time, and will be excluded by no preſcription, unleſs his adverſary can ſhow a title legally conſtituting a ſervitude to the contrary. It remains then to conſider, if it has been properly conſtitute by the conſent of the proprietor. As to which it was obſerved, *1mo*, That, where a ſuperior grants an original charter in favours of his vaſſal, as the right was *pleno jure* in him before the grant, he may qualify and burden it in what manner he thinks proper. *2do*, Where a ſervitude is contained in a charter of reſignation, if it was likewiſe contained in the diſpoſition which was the warrant thereof, and in the infeftment following thereon, there it may alſo be duely eſtabliſhed; ſince the diſpoſition which conveys the right is expreſsly qualified with that burden. But then, *3tio*, (which applies directly to the point in hand,) where a charter of reſignation contains any new ſervitude which is not ſpecified in the procuratory whereon it proceeds: in ſuch caſe, it is believed, the ſervitude is not legally conſtitute, and muſt fall to the ground, as being inſert in the charter, without any warrant, eſpecially if, as in the preſent queſtion, it is done in favours of a third party, with whom the ſuperior has no connection; the reaſon is obvious, for here the reſigner, and the perſon in whoſe favours the reſignation is made, are the only parties contracters; and the ſuperior, as he is only a hand neceſſary

to

to compleat the contract, ſo he can impoſe no burden, but, by accepting the reſignation, is bound to infeft the new vaſſal in a right as full and ample as that which ſtood formerly in the perſon of the reſigner. Nor is it of any weight, that *Warriſton* accepted the charter with ſuch a clauſe, ſince it was intirely unwarrantable, in ſo far as it is different from the diſpoſition; and therefore the vaſſal had no reaſon to regard it: put the caſe, a ſuperior ſhould unwarrantably impoſe a new burden in a charter of adjudication, ſurely the adjudger's accepting of the charter, or even taking infeftment thereon, would not infer an acquieſcence, ſo as to eſtabliſh againſt the adjudger a ſervitude to which the debtor was not liable.

As to the pretence, That, at the time of extending the charter, there had been an agreement, betwixt Sir *George Mackenzie* and the proprietor of the ſervient tenement, there is not the leaſt evidence produced to ſhow ſuch was the fact; and as, on the one hand, it cannot be preſumed that the Magiſtrates would be officiouſly interpoſing in an affair they had no concern with; ſo, on the other, it cannot be ſuppoſed that Sir *George*, if any ſuch thing had been intended, would have reſted ſatisfied with a ſervitude conſtitute in ſo precarious a manner that it could be taken away at any time without his own conſent; for the charter, the only document thereof, might have been retired next day, and a new one taken, without any mention thereof. But, ſuppoſing a ſuperior could, *proprio motu*, without any warrant, impoſe a new burden in a charter of reſignation, yet the argument would not apply here; ſince the words of the charter, if rightly underſtood, contain nothing more than what is in the diſpoſition; and it will be plain, upon comparing the two, that any ſmall variation betwixt them has been owing to the inaccuracy of the writer in tranſlating the clauſe in the diſpoſition.

The Lords found, That the ſervitude is ſufficiently conſtitute by the charter and ſaſine, and cannot be reſtricted by the marginal note in the diſpoſition; and found, That David Clelland *can neither build in the yard in queſtion, nor otherwiſe prejudge the ſuſpender's lights; and therefore ſuſpended the letters* ſimpliciter.

N° CXVII. *January* 24. 1739.

Walter Groſat Charger, contra *Henry Cunningham*, &c. Suſpenders.

Power of Arbiters.

THESE parties entered into a ſubmiſſion, wherein they bound themſelves to obtemper the decreet, under the penalty of *L.* 20 *Sterling*; and, by the decreet-arbitral following thereon, the ſuſpenders were decerned to pay *L.* 200 *Sterling*, by equal portions, at *Lambmaſs* and *Martinmaſs* then next, with *L.* 20 *Sterling* of penalty for each term's failzie; and likewiſe it decerned for a penalty of *L.* 20 *Sterling*, to be paid by the party failing to obſerve, to the party performing, or willing to perform.

It

It was *objected*, in a ſuſpenſion of the decreet-arbitral, That the arbiters had acted *ultra vires*, in decerning for *L.* 20 *Sterling* of penalty for each term's failzie.

Anſwered: Wherever a liquid ſum is found due, or decerned for by arbiters, they can either make it payable by the decreet-arbitral at a certain term, or they can decern the party debtor to grant bond for it, payable at a certain term; and, in this laſt caſe, they would decern the bond to be extended in common form, that is, with intereſt from the date, or term of payment, and a fifth part of the principal, as penalty: and the caſe is the ſame where they decern a ſum to be paid by their decreet-arbitral; the decreet-arbitral is, in that caſe, the bond, and fifth part for penalty is, of courſe, a part of the bond. There is no abſurdity at all in ſuppoſing two different penalties to be due, one by the bond, and one by the obligation to ſubmit; and both are incurred in caſe of diſobedience, the penalty in this ſubmiſſion by diſobedience, and the other by failure of payment.

The Lords reſtricted the penalty in the decreet-arbitral, to the penalty in the ſubmiſſion.

N° CXVIII. *June* 5. 1739.

Competition, Sir *John Home* of *Manderſton*, with Mr. *Alexander Lind* Admiral-depute upon the Eaſt Coaſt.

Whales do not come under a Grant of Wreck.

A Whale having been caſt a-ſhore in the barony of *Coldingham*, a queſtion aroſe betwixt theſe parties, to which of them the ſame ſhould belong.

Sir *John* claimed it in virtue of charters from the crown diſponing the ſaid barony to him and his predeceſſors, containing alſo the clauſe *with wreck and ware*; under which grant of *wreck* he pled the ſubject in controverſy was comprehended; and, in ſupport thereof, it was *obſerved*, That, by the civil law and law of nations, the right of wreck, which never had been in the poſſeſſion or property of any one, was given to the perſon who had ſaved or preſerved the ſubject (which he had done in this caſe;) as alſo that the policy or intereſt of different nations had made ſome alteration from the natural rule of equity of giving to the preſerver: for inſtance, in *Scotland* it had been thought good policy to give the right of wreck in general, without any diſtinction, as eſcheat to the crown; and that, under this clauſe, whales behoved to be comprehended, as they were not deemed royal fiſh, either by the law of this, or any other country in *Europe* (*England* excepted;) for proving whereof, the following authorities were referred to, Ordinance of *Lewis* XIV. *anno* 1681, § 53. as tranſlated by the anonymous author of a treatiſe of the dominion of the ſea and ſea-laws; *Craig*, *lib.* 1. *dieg.* 16. § 38, Laws of *Alexander* II. *chap.* 25.

Pled for the Admiral-depute: That, as whales were *inter regalia*, the one in queſtion behoved to belong to him, in virtue of his commiſſion

from the Crown; and that they were always deemed royal fiſh, appears from *Balfour*'s Practics, *chap.* 8. *fol.* 191.; Manuſcript of the forreſt laws in the Advocates Library, *tit. De judicibus*; *Welwood*'s Treatiſe of the ſea-laws, *tit.* 2. of the Judge-ordinary in ſea and ſea-fairing cauſes; *Stair*, *lib.* 2. *tit.* 5; and the deciſions Procurator-fiſcal of the high Court of Admiralty againſt *John* and *Andrew Tods*, *anno* 1665; Earl of *Rothes* againſt *Murray*, *anno* 1720. 2*dly*, They could not be conſidered as falling under the notion of wreck, and ſo paſſing to the Baron under that clauſe, as was evident from the 25th *chap. De ſtatuta Alexandri* II.; *Skeen* in his interpretation of *wreck of the ſea*; and *Craig*'s definition of that word.

The Lords found, That whales do not come under the grant of wreck.

N° CXIX. *June* 19. 1739.

Henry Hill, &c. Chargers, *contra Archibald Thomſon*, &c. Suſpenders.

Money voluntarily collected at a Meeting of the Seceders, does not fall under the Adminiſtration of the Kirk-Seſſion within whoſe Bounds it was gathered.

THE ſum of *L.* 51 *Scots* having been collected at a faſt obſerved by the Seceders, the Kirk-ſeſſion of St. *Ninians* (in which pariſh the collection was made) brought an action before the Sheriff of *Stirling* againſt the perſons who had the cuſtody of the money, to pay it to them; *alledging*, That, as the Miniſter who preached at the meeting is a Miniſter of the eſtabliſhed church, and in poſſeſſion of a legal ſtipend in the next pariſh, and the elders who collected the ſame are elders of the pariſh itſelf where the meeting was held, theſe circumſtances brought the collection under the general denomination of *eccleſiaſtical goods*, put under the direction of the Elderſhip or Preſbytery, to be by them uncorruptedly diſtributed, in terms of the 116th act of Parliament, *anno* 1592. *The Sheriff decerned the defenders to pay the money*; which they ſuſpended on this ground, That the will of the donors, expreſſed or implied, in all voluntary contributions, ought to be the rule for the diſtribution of money ſo collected. When any thing is given in charity at the church, it is given *ipſo facto* unto the kirk-box, and ſo falls under the adminiſtration of the Kirk-ſeſſion: and when, with conſent, and at the deſire of the legal church-officers within a pariſh, Divine ſervice is performed, the charity collected by them there falls under their adminiſtration, as well as collected at the church; becauſe it is preſumed that the donors know that the perſons who receive their collections do it only by virtue of their being church-officers; therefore, by giving their contributions to them, they declare their intention that it ſhould enter the kirk-box; and conſequently fall under the management of the Kirk-ſeſſion. But the caſe is quite different, when people of a ſeparate church from the one eſtabliſhed by law, meet for the performance of Divine ſervice in a pariſh, and there make contributions for charitable uſes; for here, if it is not ſo expreſſed, ſure there is nothing that can imply it to be the will of the donors, that the money

ney given by them ſhould fall under the direction of the eccleſiaſtical officers of a church of which the donors are not members; and, by the certificates produced, it is plain the contributors intended the ſuſpenders ſhould have the management thereof, who, it is a miſtake to ſay, were members of the eſtabliſhed church; as they had, before that meeting, by a writing under their hand, ſeparated from the church of *Scotland*, and joined themſelves to the Seceders.

The Lords ſuſtained the reaſon of ſuſpenſion.

N° CXX. *June* 20. 1739.

Competition, Mr. *Robert Gordon* with the creditors of Mr. *John Douglaſs*.

1. *Clauſe burdening a Conveyance, whether real or perſonal?* 2. *Is a Burden real which is only expreſſed as contained in another Writing?* 3. *In which Regiſter ought it to be recorded?*

IN the year 1710, Sir *David Murray* of *Stenhope* diſponed his eſtate to his ſon *Alexander* (afterwards Sir *Alexander*) *Murray*, in his contract of marriage; which contained, in the procuratory of reſignation, the following clauſe: "That theſe preſents are granted in favours of the ſaid "*Alexander Murray*, and the lands, *&c.* therein mentioned are reſigned, "with the expreſs burden of payment to the ſaid Sir *David* and his cre- "ditors of the hail debts and ſums of money due by him to them, and "contained in a particular liſt and inventary of the ſaid debts; as alſo "with the burden of payment to the ſaid Sir *David* his children, of the "reſpective proviſions, and portions granted by the ſaid Sir *David* to "them, all particularly ſet down in the foreſaid liſt and inventary ſub- "ſcribed by, *&c.*" In virtue of the precept, *Alexander* was infeft in the 1715, with the burdens and proviſions mentioned in the contract, and contained in the liſt and inventary therein referred to; which liſt was regiſtred *anno* 1717 in the common regiſter of the Seſſion.

In the year 1719, *Alexander* diſponed the barony of *Broughton* (part of the ſaid eſtate) to Mr. *John Douglaſs*, who having died incumbered, the Earl of *March*, as apparent heir to him, brought a ſale of theſe lands; in conſequence whereof it was ſold by public roup, before the Lords; and the purchaſer having raiſed a multiple-poinding, with reſpect to the price, there enſued a competition betwixt *Robert Gordon*, as aſſigny to a proviſion granted by Sir *David* to *Ann* his third daughter, contained in the foreſaid liſt, and the creditors of Mr. *John Douglaſs*; wherein this queſtion occurred, How far, in virtue of the foreſaid burden in Sir *Alexander Murray*'s contract of marriage, the children's proviſions became real, and were thereby effectual againſt the debts and deeds of Sir *Alexander*, or thoſe deriving right from him?

Argued for *Robert Gordon*: 'Tis plain, from the conception of the clauſe, the proviſion to which he has right is really conceived; it is inſert in the procuratory of reſignation, and the lands are declared expreſsly to be reſigned, with the burden of the debts and children's proviſions, conform to the inventary ſubſcribed by Sir *David* and his ſon: neither could any

any infeftment proceed, without reference to that liſt, or a purchaſe be regularly made, without the purchaſer's getting up the liſt of debts with the progreſs; ſo that he could not pretend ignorance of the extent of the burden therein contained. It is true, that general burdens, tho' never ſo really conceived, will not be ſuſtained in prejudice of the diſponee's creditors; but ſpecial ones, impoſed by the diſponer upon the ſubject, are real, and give as effectual a preference to the perſons intereſted therein, as if they had been infeft before the diſponee's right; and here there is, in effect, a ſpecial burden by the reference to the ſubſcribed inventary, which was regiſtrate two years before Mr. *Douglaſs*'s purchaſe.

On the other hand, it was *pled* for the Earl of *March*, and the creditors of Mr. *John Douglaſs*, That they being ſingular ſucceſſors, were not concerned to debate what effect the clauſes in the contract, and arguments thereupon, might have againſt their author Sir *Alexander Murray* and his heirs, but that theſe could not affect them: becauſe, 1*mo*, By the tenor of the contract, the lands are diſponed to *Alexander*, with the burden of theſe debts and proviſions, and he, by his acceptation thereof, is bound to relieve his father of the ſame, which is only perſonal on the diſponee, whoſe faith the diſponer truſted, without reſerving any real right in the lands. 2*do*, Theſe debts and proviſions are not at all ſpecified in the foreſaid contract, nor in the ſeparate precept of ſaſine, granted in favours of Sir *Alexander*, nor in any infeftment, or others that followed thereupon; but are only referred to as contained in a liſt, which is not at all repeated in any of the deeds aforeſaid. A purchaſer, or any tranſactor with the proprietor of a real eſtate, who is infeft therein, is not obliged to go further than the public records to know the burdens that affect the ſaid eſtate; and therefore is not concerned with any reference not contained in the deed itſelf, nor duly recorded; if it were otherwiſe, it would often happen that the writs referred to could not be got, and then the reference in the recorded deed could ſignify nothing, whereby the regiſter would be imperfect, and lead one into a ſnare, or to inſufficient knowledge of what it ſhould ſufficiently inform him of: but, when one is not obliged to notice any thing but what is in the proper regiſter, then it is his own fault if he ſuffer; nor can it vary the argument, that the inventary is recorded; ſince it is only in the common regiſter of the Seſſion, but not in the regiſter of ſaſines; where, nevertheleſs, it muſt have been recorded, if to be ſuſtained as a real burden on the lands whereon that ſaſine was taken; for it is only the regiſter which people do, or are bound to ſearch for that purpoſe, and with which the common regiſter has nothing to do.

The Lords found the clauſe in the contract of marriage burdening the lands, baronies, tenandries, and others, and the reſignation therein mentioned, with the payment of Sir David Murray's *debts, contained in a particular liſt and inventary thereof, neither expreſſed in the contract of marriage aforeſaid, nor regiſtrate in the regiſter of ſaſines and reverſions, does not render the debts in queſtion a real burden upon the lands conveyed by Sir* David Murray *to his ſon* Alexander *by the ſaid contract of marriage.*

N° CXXI. *June* 22. 1739.

Competition, *Ann Napier* with *Jean Craick*.

Can a Father qualify a Proviſion to a Child in a Contract of Marriage with a ſubſequent Subſtitution, ſo as to hinder the Child's free Diſpoſal thereof in Minority.

BY the poſt-nuptial contract of marriage betwixt *William Craick* of *Duchrae*, and *Ann Napier* his ſpouſe, among other proviſions to children of the marriage, he obliged himſelf, in caſe there ſhould be but one daughter of the marriage, to provide her in *L.* 300 *Sterling* due by two different bonds, reſerving, nevertheleſs, full power to himſelf to intromit with, uplift, and receive the ſaid ſum, *&c.* provided he lend out and re-employ the ſaid principal ſum upon ſufficient ſecurity, for the uſes and purpoſes above mentioned. Of this marriage there exiſted an only child, *Katharine*, to whom her father granted an aſſignation of the foreſaid bonds, as the fund of her proviſion; the aſſignation ſet forth the proviſion in the contract of marriage, and the bonds, the ſubject thereof, that *Katharine* was the only child of the marriage; " and that it was neceſſary to make " up more ſpecial titles in her perſon to the foreſaid ſums, and to determine who ſhould ſucceed thereto upon the event of her death, without " diſpoſing of the ſame; therefore, for preventing any difficulty that " may ariſe anent the ſums foreſaid, and that the ſame may be applied " according to the deſign of the contract, in corroboration thereof, he " makes, conſtitutes, and ordains the ſaid *Katharine Craick*, and her " heirs and bairns lawfully to be procreate of her body, or her aſſignies; " which failing, *Jean Craick*, his only daughter of his firſt marriage, her " heirs, *&c.* his ceſſioners and aſſignies in and to the foreſaid bonds."

This aſſignation, by a ſubſequent clauſe, likewiſe provided, " That " the ſaid *Ann Napier*, the granter's ſpouſe, mother to the ſaid *Katha-* " *rine*, ſhall have power, *&c.* after his deceaſe, until the marriage, or " majority of the ſaid *Katharine*, which of the two ſhall firſt happen, to " uplift and diſcharge the annualrents of the ſaid principal ſum to be ap- " plied for the aliment and maintenance of the ſaid *Katharine*, until her " marriage or majority; and, for that effect, nominates and appoints the " ſaid *Ann Napier* ſole tutrix and curatrix to her, providing always ſhe be " bound, by the acceptation thereof, to aliment her, *&c.*"

Katharine Craick, after her father's deceaſe, when ſhe was thirteen years of age, transferred the two bonds to her mother, with a proviſo, That it ſhould be lawful for her, at any time during her life, or on death-bed, to alter the ſaid deed; and, in the year thereafter, ſhe execute a teſtament, appointing the ſaid *Ann Napier* her only executor, ſole legatar, and intromittor with her whole goods, gear, debts, and ſums of money.

Katharine having died unmarried, there enſued a competition betwixt *Jean Craick*, the daughter of the firſt marriage, who claimed a right to the ſaid bonds, in virtue of the ſubſtitution contained in the foreſaid aſſignation; and *Ann Napier*, who inſiſted that ſhe ought to be preferred thereto as aſſigny, by the deeds made by her daughter in her favours.

It was *pled* for *Jean:* That there could be no doubt but her father might burden the proviſion with a ſubſtitution in her favours, in caſe of *Katharine*'s deceaſe before marriage or majority, which, taking the whole deed together, is the only import of the ſubſtitution, that being an act of rational adminiſtration, and even ſo as to hinder the child to diſappoint the ſame, before either of theſe periods, by gratuitous deeds. In caſe any other ſubjects had belonged to her, proceeding from ſtrangers, the father could not perhaps have impoſed any ſubſtitution thereon in prejudice of the child's free diſpoſal by teſtament, after its pupillarity: but that cannot apply to the preſent caſe, where the father, if there had been more children, had a full power of diviſion among them, whereby he might have made their ſhares very unequal; and therefore, as there happened to be but one, he might, in virtue of his parental power, ſecure that child's proviſion againſt its being given away gratuitouſly by her during her minority. And, as to the liberty of deſtinating or bequeathing this ſum, which is, by law, competent to minors after their pupillarity, nothing could hinder the father to diſappoint her of that liberty; might he not have uplifted the bonds, and ſecured the ſum upon land, whereby the power of teſting thereon would have been effectually defeated? if ſo, it is *contended*, the equivalent is done here, as the ſame is rendered heritable, and *Jean* created heir of proviſion therein, failing her ſiſter, and the heirs of her body.

2dly, There is here a virtual prohibition of all deeds done in the contrary during minority, or till *Katharine*'s marriage; for the mother is expreſsly named tutrix and curatrix for the ſpecial end of uplifting the annualrents till her daughter's majority or marriage; which imports that ſhe could not uplift the principal ſum, without the curatrix's conſent, before either of theſe periods. In the *next* place, this ſettlement renders the ſubject heritable as to *Katharine* and the heirs of her body; for, by the ſubſtitution, it is impoſſible *Jean* could take the right otherwiſe than by a ſervice to her, as ſhe is ſubſtituted to her and the heirs of her body: now, as minors cannot alter a ſubſtitution in heritage, it muſt follow, of courſe, that the right to the bonds being heritable by deſtination, could not be altered during that period; or, at leaſt, till her marriage, if ſhe had been married before majority.

But, ſuppoſing *Katharine* could have altered the ſubſtitution in her minority, it was *objected* to the aſſignation, *1mo*, That it is null, as being in the form of a deed *inter vivos*, in favours of a mother, who was named ſole tutor and curator; conſequently, could not be *auctor in rem ſuam*; and it could not ſubſiſt without her authority to validate it, as the minor had no power to aſſign, without being authoriſed by her. *2do*, The ſubject being heritable, could not be bequeathed by teſtament; and, that it was ſo, is plain from this, that the proviſion is to *Katharine and the heirs of her body*, whereby executors are virtually excluded; and therefore it were abſurd to ſuppoſe ſhe could deviſe the ſame to executors, more than in the caſe of a bond, otherwiſe moveable, ſecluding executors.

It was *pled* for *Ann Napier:* That ſhe ought to be preferred, in virtue of the deeds made by her daughter, when ſhe was of age capable to make a teſtament or diſpoſition of her moveable eſtate to take effect, in caſe of her deceaſe, without altering the ſame; for that theſe deeds would have been effectual on the footing of the contract of marriage, if the aſſignation or ſubſtitution, under which the other Lady claims, had never been

been made; and by that voluntary ſubſtitution of his own daughter of a former marriage, it neither was in the power, nor in the will or intention of *Duchrae* to limit or reſtrain the intereſt of his daughter, in the diſpoſal of her own portion, or to put her in a worſe condition than ſhe would have been on the footing of her mother's contract; which is plain from the terms of the proviſion itſelf, to wit, that theſe two bonds ſhould be provided, and ſecured, and belong, of right, to the only daughter of the marriage, in all time after the deceaſe of *Duchrae*, whereby ſhe came to be creditor or aſſigny thereto; and, by ſurviving her father, could have taken the full property of them, and being moveable ſums could no doubt have diſpoſed of the ſame by teſtament at any time after her pupillarity. Now, if ſuch was the intereſt of the only daughter in her portion, on the footing of her father's obligation by the contract, it is *contended*, That it was not in his power, the debtor, by any gratuitous deed or ſubſtitution, to leſſen that right, or to diſable the child from the liberty and power of teſting, in caſe of her deceaſe before majority: for, whatever may be ſaid in ſupport of the father's power over the eſtate of his family, provided to the heir of a marriage, whereof he remains the abſolute fiar during his own life, to make a tailzie thereof, it is believed there can be no queſtion that the proviſion of a ſpecial and moderate ſum of money, as the portion of an only daughter of a marriage, was always underſtood to be given and taken free and abſolute from any fetters or limitations, other than ſhould be conſented to in the contract itſelf. But, in fact, it does not appear that *Duchrae* had any intention to impair, in the leaſt degree, this proviſion; for he makes the aſſignation not in lieu or ſatisfaction of the contract, but in corroboration thereof, and *accumulando jura juribus*, he gives her a ſpecial title to ſave the expences of making up titles to the bonds after his death; and ſubſtitutes his other daughter *Jean* to her, not with an intent to reſtrain *Katharine*'s free diſpoſal, but, on the contrary, with this expreſs declaration, That the ſubſtitution is made to determine who ſhall ſucceed in the event of her death, without her diſpoſing upon the ſame, or without iſſue. Nor is there any foundation for limiting the words in the aſſignation to *Katharine and her aſſignies* to onerous aſſignies; for, ſuppoſing it had been a gratuitous deed, there are no words, nor any reaſon for inferring this conſtruction, and it ought not to be preſumed. 2*dly*, Whatever might be the effect of this ſubſtitution, had the aſſignation been properly gratuitous, the caſe muſt be taken as it truly ſtands, and the deed interpreted accordingly. The aſſignation to *Katharine* was in ſatisfaction of an anterior debt; and, if that was given to her and her aſſignies at large, the debt was ſatisfied; but, if otherwiſe, the obligation was not fulfilled; in theſe circumſtances, therefore, the aſſignation ought to be taken in its full extent, *ſcil.* to her aſſignies, gratuitous, as well as onerous.

With reſpect to the objection to the form of the aſſignation by *Katharine* in favours of her mother, it was *anſwered:* That *Ann Napier* was not conſtitute curatrix to her daughter properly, or univerſally, but only for the ſpecial purpoſe and effect therein expreſſed, namely, to give her power to uplift the annualrents, which ſhe was to be allowed as a fund for the maintenance of her daughter: conſequently ſhe had no power concerning the principal ſum, or any other power of a curator, as to the ſeparate eſtate, if any had been, of her daughter; therefore, ſo far as concerned theſe, the daughter had no curator, and the aſſignation which ſhe made to her mother alone was equally valid with the act of any other

minor

minor who has no curator at all. 2*do*, It was valid in this other reſpect, That, tho' it was an aſſignation *inter vivos*, it was, in effect, a ſettlement of her ſucceſſion, being ſo far of a teſtamentary nature, that it reſerves a power to alter at any time.

As to the objection againſt the effect of *Katharine*'s teſtament, That the two ſums were rendered heritable *deſtinatione* by the ſubſtitution, it was *anſwered:* That, ſuppoſing *Jean* muſt have been ſerved to cognoſce the failure of iſſue of her ſiſter, it is another queſtion, whether the bond being perſonal in *Katharine*, might not be carried by her teſtament; for which Sir *James Stewart*, in his Anſwers to *Dirlton*'s Doubts, *p.* 17. gives his opinion in the affirmative, where he ſays, " That where a particular " ſubject is tranſmitted, from which executors are excluded by the deſti- " nation, the tranſmiſſion may be by way of ſervice, and yet the ſubject, " if moveable, is ſtill teſtable." But, in this caſe, tho' there is no mention of executors of *Katharine*, there is mention of her aſſignies; and it is failing theſe, as well as her iſſue, that *Jean* is ſubſtitute; and therefore, as theſe have not failed, there is no place for *Jean* to claim, either by ſervice, or as *nominatim* ſubſtitute in this aſſignation. *Laſtly*, It is obſervable, that both theſe objections are founded merely upon the voluntary and gratuitous ſubſtitution of *Jean*, which could work no prejudice to her ſiſter, who was creditor, by an anterior obligation, for the two bonds aſſigned to her.

The Lords found, That the aſſignation by William Craick, *to* Katharine *his daughter, of the ſums provided by her mother's contract to the ſaid* Katharine, *and her heirs, and bairns, or her aſſignies; which failing, to* Jean Craick, *his daughter of a former marriage, did not limit or prejudge the power of* Katharine *to diſpoſe of the ſubjects at her pleaſure, even by voluntary or gratuitous deeds; and found that ſhe had effectually diſpoſed of the ſame to* Ann Napier *her mother, by her aſſignation, reſerving liberty to herſelf to alter at any time of her life; and alſo by her teſtament, whereby ſhe nominated the ſaid* Ann Napier *her executor and univerſal legatar; and therefore preferred the ſaid* Ann Napier.

N° CXXII. *Eodem Die.*

Mackenzie of *Dundonald*, contra *John Tuach.*

Can Money conſigned for the Redemption of a Wadſet be lawfully arreſted, ſo as to be made forthcoming for the Reverſer's Debt.

TUACH having right to the reverſion of ſome lands which he had wadſet, conſigned one moiety of the reverſion-money (in terms of the backbond) in the hands of Bailie *Fraſer*, on the 11th *March* 1738; and, in *November* thereafter, he execute a declarator of redemption, in which he obtained a decreet before the Lord Ordinary in terms of his libel. Betwixt the date of the conſignation and executing the declarator, *Mackenzie* of *Dundonald*, as creditor to *Tuach*, arreſted the conſigned money in the Bailie's hands, and inſiſted in a forthcoming.

It

It was *pled* for *Tuach* the reverſer: That he has no property in the money conſigned, conſidering it as a ſpecies or fungible, nor any other intereſt therein, than that of a conditional creditor to the conſignator, in caſe he ſhall not prevail in his declarator, as the wadſetter is likewiſe, in the event that by the declarator the order is found lawfully proceeded in; and therefore, pending the condition, no forthcoming can proceed; becauſe, till then, it is not known who is the creditor: and if, as in this caſe, the order ſhall be found lawfully proceeded in, ſo as that the reverſer prevails in the declarator, it is certain, that the reverſer is not creditor, and that the wadſetter is. But there is another reaſon why an arreſtment cannot affect a ſum conſigned, either for the debts of the reverſer, or wadſetter, to wit, that after the order, and till declarator, it is deemed heritable, and of the ſame nature with the right to be redeemed; ſo ſays *Stair*, *lib.* 3. *tit.* 1. Aſſig. *page* 375; *Spotiſwood's Practics*, 25th *November* 1624. *Hetburn.*

Argued for the purſuer: The reverſer has no legal intereſt to plead the money does not belong to him; therefore it is *jus tertii* for him to make any objection, tho' perhaps it might admit of a different conſideration, were the wadſetter in the field laying claim to it.

2*dly*, Nothing ſeems more firmly eſtabliſhed in law, than that the property of a ſum conſigned, in order to redemption, remains with the conſigner, until the wadſet be looſed, either by a decreet of declarator, or by the wadſetter's accepting of the ſame, and renouncing his real right in conſequence thereof; upon this footing it is that the hazard of the conſignation lies upon him. It is further clear, that there is not ſo much as a *jus quæſitum* to the wadſetter by the conſignation; it is in the power of the reverſer to paſs from his order, and uplift the conſigned money: in this all our authors are clear; it ſhall ſuffice to cite *Stair*, *tit.* Wad. § 20, and 21; *January* 1673, *Nicol.* If then it be ſo, that the property of a conſigned ſum remains with the conſigner, and that he can exerce all acts of property upon it, by uplifting the ſame, and diſpoſing thereof at his pleaſure, how can the conſequence be avoided, that it may be attached by his creditors, and, particularly, that it may be made forthcoming upon an arreſtment? 2*do*, The arreſtment was laid on before the proceſs of declarator was raiſed or execute, while indiſputably it was in the reverſer's power to paſs from his order, and uplift his own money; and, if ſo, it was not in the power of the common debtor, by chuſing thereafter to inſiſt in a declarator, to prejudge his creditor, or diſappoint the arreſtment once legally eſtabliſhed.

Anſwered: That the money might periſh to the conſigner, ariſes from the paction contained in the letter of reverſion; therefore it is no juſt conſequence, that the property was in the conſigner: and it frequently happens, as in the caſe of mandates not duly followed out, goods periſhing will not periſh to the owner, but to the mandator, who, by the obligation ariſing from law, had equally transferred the hazard upon himſelf, as the reverſer does by paction. And, with regard to the ſecond obſervation, *ſcil.* That the arreſtment barred the declarator, it was *anſwered:* If the reverſer was not purely creditor, but only ſuch *ſub conditione*, the arreſtment behoved to follow the nature of the ſubject arreſted, which being *ex eventu* declared to be the wadſetter's, and not the reverſer's, the

condition was purified; ſo as the arreſtment could affect nothing, and be no *medium impedimentum*.

The Lords found, That in this caſe the arreſtment did not affect the conſigned money, without prejudice to inſiſt, &c.

N° CXXIII. *July* 3. 1739.

Dr. *Penman* contra *Margaret Douglas*, and *Katharine Cochrane*.

The act 41. *Parl.* 1661. *burdening the Heritor of the adjacent Ground with the Half of the March-Dyke, does not reach Feuars, who have not above five or ſix Acres.*

THE Doctor intending to incloſe ſome acres which belonged to him, lying contiguous to the village of *Inveraſk*, brought a proceſs on the above act againſt his two neighbours, concluding, that they ſhould, in terms thereof, be at equal pains and charges with him in building a ſtone and lime-dyke, as a march betwixt their reſpective lands.

The ſubſtance of the defence was: That ſmall feuars, who have one, two, or poſſibly ſix acres of ground, are not comprehended under the act; and the lands belonging to the defenders do not ſeparately amount to ſix acres: if ſo, it would be extremely hard, by the extending of a correctory law, they ſhould be forced to ſell one half of their mailling in order to incloſe the other. But, with regard to this point, it ſeems a miſtake to ſuppoſe the ſtatute is abſolute, obliging heritors, without any other exception, ſave that of burrow and incorporate acres, to concur in the charges of a march-dyke; as that would be hard and unreaſonable. Take the caſe, for example, of runrig, where ſingle riggs belong allenarly to a ſcore of heritors; ſuppoſe nineteen of theſe purchaſed in by one, ſo as to make a compact incloſure, would it not be moſt unconſcionable to burden the heritor of the remaining twentieth rigg with half the expence of the march-dyke that runs along the ſide of his rigg? an expence probably greater than the worth of his land. And, when the act itſelf is duly examined, it will not be found to comprehend the caſe of ſmall heritors: *It ſtatutes, That every heritor of* L. 1000 *yearly valued rent, ſhall incloſe four acres, and plant the ſame about with trees.* The ſubſequent clauſes likewiſe, with regard *to the power of caſting about highways, impoſing a penalty on thoſe who cut or break trees*, &c. are all relative to this caſe, and to be explained by it: from all which we may conclude, that no heritor is bound to contribute to a march-dyke, ſave he who falls under the enacting clauſe in the beginning of the ſtatute, obliging heritors to incloſe ſo many acres yearly, effeiring to their valued rent. It is true, the obligation to incloſe is laid upon heritors who have leſs than *L.* 1000 of real rent; but then it is obvious this cannot reach heritors indefinitely, however ſmall the rent be: they muſt be ſuch who can incloſe ſo much yearly, tho' the exact limits be not fixed: nay, the argument may be carried ſomewhat farther, as there appears no authority from the act for claiming the half of the charges, except in favours of ſuch heritors allenarly who are laid under

der a neceſſity of incloſing ſo much yearly. It may be ſaid indeed, that this conſideration tends to make the regulation anent the march-dyke temporary; ſeeing the obligation to incloſe was to laſt but for ten years from the date of the act, altho' by the ſtatute 17. Parl. 1669. the ſame is made perpetual: but, whatever be in this, one thing ſeems evident, that the ſaid regulation, which was meant partly, at leaſt, as an encouragement for ſuch heritors who are laid under a neceſſity of incloſing by the ſaid act, can never be extended to march-dykes of ſmall feuars; a caſe not under the purview of the ſtatute, and who, with reſpect to incloſing, are left upon the footing of the common law. What further tends to confirm this opinion is, that, if the clauſe in controverſy ſhall be taken by itſelf, independent of the other clauſes of the act, burrow and incorporate acres muſt be ſubjected to the ſame regulation with other acres that are not in that ſtate: for the exception of burrow-acres is not introduced as a limitation of the ſaid regulation, it is in a former part of the act, and introduced as an exception from the obligation to incloſe. Now, it ſeems paſt a doubt, that, if the clauſe anent the march-dyke is to be taken by itſelf, independent of the other clauſes, and not limited by them, it muſt be taken independent of this clauſe in particular of burrow-acres, ſo as to ſubject theſe to the regulation anent the charges of a march-dyke, in common with other acres.

2*do*, Suppoſe the defenders fell under the ſtatute, they are not bound to contribute to a ſtone-dyke. The act is for the benefit of planting, as well as incloſing, and that view runs through the whole of it; nor is there any other march-dyke ſpecified therein, but that which is ditched and planted.

Anſwered for the purſuer: Since it is admitted, that the clauſe of the act 1661 libelled on, as explained and amended by the act 1669, is at this day a ſtanding law; the only queſtion that remains, is concerning the ſenſe or interpretation thereof. As to the words of the ſtatute, they are as general as can well be conceived; *Where incloſures fall to be upon the border of any perſon's inheritance, the next adjacent heritor ſhall be at equal pains and charges*, &c. Now, the parties here are poſſeſſed of the property of lands, which, ſmall as they are, are their reſpective inheritances, and capable of being incloſed to advantage. Nor does the words of either of the acts intitle the defenders to plead an exception in their caſe, as the law does not make any diſtinction of the meaſure or ſize of the property of the perſons intending to incloſe; and, if it be once departed from, it will be difficult to lay down a rule how many acres the property of conterminous heritors muſt conſiſt of, before the ſame be ſubject to, or fall under the law; for, if heritors of ſix, or eight, or ten acres be exempted, how ſoon will it begin to take place? Muſt it be twenty five, fifty, or a hundred acres; or what other meaſure?

The ſtrain of the defenders argument is, to tack this general clauſe, which is the laſt in the act, to the firſt, that concerns the obliging heritors of ſo much valued rent to incloſe four acres yearly, what they think cannot apply to ſmall feuars: but, as the one clauſe has no connection with, or dependance on the other, tho' in the ſame act; ſo the firſt clauſe ſtatutes in general, That the ſame rule ſhall hold proportionally, with reſpect to other heritors of greater or leſſer quantities of ground, than that ſpecially therein mentioned. But, in the caſe of ſuch heritors as are now conteſting, there is truly no place for any real hardſhip, by applying the law

law to incloſures, either exceſſively great, or ridiculouſly ſmall; for the leaſt of the defenders properties being ſix acres of good ground, ſituated in a populous country, would make a very compact and commodious incloſure; and, in general, as to the caſe of ſmall feuars, whereof there are many throughout the kingdom, there ſeems to be no claſs of heritors to whom more properly this regulation ſhould be applied for the encouraging incloſures, than to theſe; for the very intent of giving and taking ſuch feus is in order to improve the ground; and they are generally of ſuch ſize as are not too ſmall to be worth incloſing, nor too large to be capable of being incloſed; they are in the *medium* betwixt the two extremes, in which it is poſſible to put caſes where the law could prove a grievance.

With reſpect to the *ſecond* defence, That heritors are not obliged to contribute to any march-dyke, but what is ditched and planted, it was *obſerved:* That, tho' the act 1661, with regard to this point, is ſomewhat ambiguous, yet the ſtatute 1669 clearly provides for an alternative, according to the nature of the ground, as it may be fit for a dyke or ditch. 2*dly*, The ſame law gives the election to the purſuer, who is perſuaded the defenders are ſenſible it would even be a prejudice to themſelves to have march-dykes by ditch or hedge.

The Lords found the act 41. *Parl.* 1661, *did not reach to ſmall feuars, who had not above five or ſix acres of ground.*

N° CXXIV. *July* 6. 1739.

John Corsbie contra *James Shiell.*

1. *The Informality of a Subſcription, by one Nottary and two Witneſſes, to a Contract of Importance, may be ſupplied by the Party's Oath.* 2. *Qualified Oath.*

CORSBIE being creditor to *Shiell* for the ſum of 400 merks, due by bond, charged him for payment, which he ſuſpended on this ground, That, by a mutual contract betwixt the ſuſpender and his creditors, he was bound to diſpone to them his haill heritable ſubjects, which they agreed to take in ſatisfaction of their reſpective claims, and to diſcharge him of the ſame, upon delivery of the diſpoſition; which being accordingly done, the charger, who is one of the creditors, was bound to grant a diſcharge, in terms of the contract.

Anſwered for the charger: That the contract was ſigned for him but by one Nottar and two witneſſes, and conſequently null. To ſupply this defect, the ſuſpender referred it to the charger's oath, whether or not he had given orders to the Nottar to ſign for him; who accordingly deponed, *That he deſired* William Hunter *the Nottar to put his name down to the contract, and to ſell the lands, and pay the haill debt.* Whereupon the ſuſpender *pled*, That the charger having acknowledged he gave orders to the Nottary to ſign for him, is ſufficient to ſupport the ſubſcription, and bind him to the common meaſures; were it not for the adjected quality, the matter would be paſt diſpute. Let us examine what effect the adjected clauſe can have, ſignifying that he gave orders to the Nottar *to ſell the land*,

land, and pay his haill debt. With regard to which, it is obvious, that nothing can be more abſurd than this addition; the Nottar's part was to ſubſcribe for the charger, he had no earthly buſineſs with ſelling the land, or paying the debt: and, if it be meant that this was the ſuppoſition or condition upon which he gave orders to the Nottar, it is inconſiſtent with the oath itſelf; for, to give orders to ſign a contract, is to give orders to ſign the ſame as it ſtands, and it muſt be evident for itſelf. The queſtion then comes to this, Whether the command muſt be taken by itſelf to ſupport the contract, or if the effect of the oath muſt be to prove that the charger ſubſcribed the deed with a quality and condition directly inconſiſtent with the contract itſelf? And, as to this, it is true, that when a contract is informal on the act 1681, and the verity of his ſubſcription is referred to a party, it has been thought by ſome lawyers, that he might add to his acknowledgment that the debt was paid, or deed performed, *&c.*; tho' of this there is ſome doubt. It goes on this foundation, That the deed is *ipſo jure* null, and that an informal ſubſcription is the ſame with none; upon which ſuppoſition, there would be nothing left but to refer the verity of the debt to the party's oath: but this is far from being juſt reaſoning; a ſubſcription of a bond, tho' not formal, upon the act 1681, is yet ſufficient to found an action; it is not *pars judicis* to lay hold of the informality, but the buſineſs of the party: hence it follows, that any deed of homologation, implying an acknowledgment of the party's ſubſcription, is held ſufficient, *perſonali objectione*, to bar the party from pleading his objection, 21ſt *January* 1735, *Telfer*. If this be law, it ſeems to follow, that any act or deed, tacitely implying the verity of the ſubſcription, would have been ſufficient, much more a direct acknowledgment. The moment that acknowledgment is interpoſed, there is an end of the controverſy, the contract is rendered effectual at all points; after which, let the party add what facts and circumſtances he has a mind, they ought to be conſidered as extrinſic, and nothing to the purpoſe. But, 2*do*, Let it be ſo, when the verity of a ſubſcription is referred to a party's oath, that he will be allowed to give a qualified oath, yet ſurely it was never found that he can add qualities inconſiſtent with the terms of the contract. Suppoſe a bond, null upon the act 1681, is referred to the party's oath, would he be heard, after acknowledging his ſubſcription, to ſay that the bond was only for fifty, when it clearly appears to be for a hundred? When the charger ſubſcribed the contract, to be ſure, it was to teſtify and interpoſe his conſent to the ſame, when he adds, That it was to get payment of his whole debt; what is this, but, in other words, to ſay, That, tho' I ſubſcribed the contract, I did not intend to be bound by it? 3*tio*, To give the charger the whole advantage of his oath, let it be ſo, that he ſubſcribed the contract in order *to ſell the lands, and get payment of his whole debt*, even this is ſufficient, *in hoc ſtatu*, to bar him from perſonal diligence. There is no evidence in the field, what may be the extent of the ſubjects in the contract, nor any certainty; but, upon good management, they may be diſpoſed of ſo as to anſwer the whole debts; when this negotiation is finiſhed, and effects turned into money, and applied for payment of the debts, then, and no ſooner, will there be place for conſidering the quality of the oath; and, if then any part of the charger's debt remain unpaid, there may be acceſs to do perſonal diligence for the balance.

Anſwered for the charger: Tho' he has owned he gave command to the Nottary to ſign for him, yet the allegation is by no means relevant; and that it is ſtill entire to him to object. Suppoſing this to be a ſubject of *L.* 1000 *Sterling*, as indeed it is his all, an acknowledged mandate to one Nottary to ſign makes no ſubſcription; the reaſon for introducing the law, was, that one Nottary might not, by colleaguing with the other party, impoſe on illiterate perſons; therefore it requires two, in matters of importance, in order that they may be checks on one another. As the law has thus declared what ſhall be equal to a party's ſubſcription, ſo no conſent can ſubſtitute any other equivalent; that is, no conſent of the party can make the atteſtation of a Nottary, in matters above *L.* 100 *Scots*, to be a legal ſubſcription; and this is the difference betwixt eſſentials and ſolemnities; the laſt are introduced for the ſake of parties, and may poſſibly be diſpenſed with. For inſtance, where a witneſs is imperfectly deſigned, one may ſay that he is not bound to find out that witneſs; and, if he waves that objection, by any equipollent deed, he cannot return to it; but, in eſſentials, he has no power. For example, where a deed is not ſubſcribed at all, he may enter, if he pleaſes, into a new bargain; but he cannot make that paper a deed of his, becauſe that is fact, which will not change. In the ſame manner, he cannot make, nor agree to hold a deed of importance, atteſted by one Nottary, to be his deed; becauſe it is the law, and not the deed of the party, that declares what ſhall be equivalent to his ſubſcription; ſigning is the eſſence of a deed, and ſuch a writing, not atteſted by two Nottaries, is not ſigned at all; ſo that here is a deed without a ſubſcription. If this is allowed, it is a vain queſtion, whether the charger gave warrant to the Nottary to ſign the deed; admitting he did, ſtill the queſtion remains, whether that atteſtation makes up his ſubſcription; and, if the law ſays that nothing leſs than a warrant to two is ſufficient, it is to no purpoſe to prove that he gave warrant to one. With reſpect to the reaſoning touching the quality of the oath, it was *obſerved*, That the ſame was very plain, and altogether intrinſic. The queſtion aſked upon oath, was, Whether the charger had given warrant to the Nottary to ſubſcribe this deed for him? and the man honeſtly anſwers, That he does not know one deed from another; becauſe he can neither read nor write; but that the Nottary told him the contents of a deed, containing powers to the Nottar, with others, to ſell *Sheill*'s land, which would pay his haill debt; and that he gave him commiſſion to ſign ſuch a deed for him; and, if any ſuch deed appears (according to the preſent ſuppoſition) he will be bound by the Nottary's atteſtation. Now, to apply this to the fact, a deed of a quite different nature appears, part of the ſubject being retained, whereby the creditors will fall very ſhort of their payment. It is plain from the depoſition, that the charger gave no warrant to ſign this deed, but quite another one, which never was executed, nor even intended by the ſuſpender. It is true, the oath is inconſiſtent with this contract; but what then? the charger is not bound by it; for he denies he ever gave warrant to ſign any thing like it. As to the example of the verity of a ſubſcription to a bond for an hundred being referred to oath, and that the defender ſhould acknowledge his ſubſcription, but ſhould add, that the bond was only for fifty; in which caſe, the quality would be extrinſic. It was *anſwered*, That the doctrine was true, but does not apply to the preſent queſtion, where the verity of a ſubſcription is referred to the oath of a party, who can write; he has himſelf to blame for not reading

reading it: ſo, if he has ſigned a paper of different contents from what he believed, the quality will not be extrinſic, but irrelevant, unleſs he can qualify and prove fraud; but it is otherwiſe, when a party can neither read nor write, the paper may be read or repeated falſely to him, and he muſt take every thing upon the faith of ſtanders by: ſo, in the one caſe, the deponent anſwers pointedly to the queſtion; *Did you ſign this individual paper?* he knows it from another, and can anſwer accordingly; and, if he owns his ſubſcription, he may be allowed to be bound up by his deed; but one who can neither read nor write, can give no anſwer to this queſtion, *Did you give warrant to ſubſcribe this paper?* becauſe he does not know one from another; he can only anſwer, That he gave warrant to ſign a paper, and that paper he muſt deſcribe by the terms thereof: ſo that, in the caſe put, if a man who cannot read and write ſhould be aſked, If he gave warrant to ſubſcribe a bond for a hundred? and he ſhould anſwer, No, but that he had given warrant to ſubſcribe a bond for fifty, it would be abſurd to pretend, that his oath muſt be diſregarded, becauſe it is not agreeable to the bond which appears: on the contrary, the bond could not be regarded, becauſe of its being inconſiſtent with the oath.

The Lords found the ſubſcription of one Nottary and two witneſſes to the agreement produced, and now quarrelled as informal, was ſuppliable, and ſupplied by the party's oath.

N° CXXV. *July* 10. 1739.

David Kinloch contra *William Fullarton*, &c.

A foreign Deed, habily executed according to the Law of the Place, has the ſame Effect which it would have had, if it had been executed in Scotland.

THE deceas'd Dr. *Fullarton*, a *Scotſman* by birth, reſided moſt part of his life in *London*, and died there. Sometime before his death, he contracted ſeveral debts, particularly a promiſſory note of *L.* 100, to *Hugh Fraſer*, and ſome book-accounts to perſons at *London*, who aſſigned their reſpective claims to Mr. *Kinloch*; on which he brought a proceſs againſt the Doctor's children, as repreſenting their father, for payment; and inſiſted particularly againſt *William* the eldeſt ſon, on the paſſive title of charged to enter heir, who as heir to his father, had right to an heritable debt for *L.* 2000, on an eſtate in this country, upon making up a title thereto.

Pled for *William Fullarton:* As the debts purſued for were contracted in *England*, they behoved to be regulated by the law of that country, by which the heir could not be reached for bills, promiſſory notes, or book-debts, but only the executors or adminiſtrators: that the heir could only be liable for ſuch deeds of his anceſtor, where heirs were ſpecially expreſſed, *viz.* ſuch obligations, where one binds himſelf, his heirs, executors, or adminiſtrators; and, as this is an eſtabliſhed point in the law of *England*, the preſent queſtion comes to this, If it is juſt or reaſonable that theſe debts ſhould produce any action here againſt him? In order to clear this point, it was *obſerved*, That it is but *ex comitate* originally that debts,

debts, contracted according to the law of the place where the deeds are execute, tho' diſconform to the law of the place where they are ſued for, are ſuſtained at all. It is very true, it has in a manner become the law of nations, that deeds executed conform to the law of the place where they are granted, ſhall be ſuſtained every where: hence it is that ſuch deeds granted abroad, as they receive their binding force from the law of the reſpective countries, ſo they can have no further effect, or produce any ſtronger action, than is allowed by the law of the place where they are granted: as the meaſure of the obligation muſt be taken from thence, ſo muſt the effect and extent of the action thereon, either againſt the obligor or his ſucceſſors, *unumquodque eo modo diſſolvitur*, &c. The creditors in the debts ſued on muſt be preſumed to have conformed themſelves in their contractions to the law of their own country; and, as they did not take a proper obligation, binding the Doctor and his heirs, how can they expect action ſhall be ſuſtained againſt his heirs any where? They have contracted upon the faith of the Doctor himſelf, and his executors only being liable; and therefore cannot ſue the heir any where, who is intitled to a liberation by the form of the contraction; in the ſame manner as the Doctor himſelf would have been free, and all his repreſentatives, if the obligation had been void by the law of *England*, and would have been aſſoilzied from any action ſued againſt them in any other part of the world, as well as in *England*; *quod juris in toto idem in parte*. Further, foreign bonds are taken away in the ſame manner as is allowed by the law of the place where they are granted. *E. g.* Payment of an *Engliſh* bond will be ſuſtained to be proved by witneſſes, or the oath of the cedent, in prejudice of an onerous aſſigny. Thus likewiſe the limitation of actions introduced by the ſtatute 21. *Jacobi* I. takes place here with reſpect to debts contracted in *England*. Now, by the ſame rule, every juſt exception that lies againſt debts contracted abroad, by the law of the place, is receivable againſt them every where, whether ſuch defence tends to a total abſolvitor in favours of the debtor himſelf, and all his repreſentatives, or in favours of his heirs, in contradiſtinction to his executors. By the law of *England* likewi e, if one binds his heirs and executors, without binding himſelf, the obligation is void; and yet, with us, ſuch obligation has been found effectual to produce action: would it not be abſurd to ſuppoſe, that a bond of that tenor, granted in *England*, ſhould be ſuſtained here; that a deed, originally null, ſhould become good by change of the place of action? If ſuch bond could not be ſuſtained here, is it not a natural conſequence, that, where one binds himſelf, without mentioning his heirs, the contraction ſhould be void as to the heirs, conform to the law of the place where the debt accrues. From all which, it is plain, that, as the defender could not be liable by a direct-ſervice, ſo neither can he, by a charge to enter heir.

Anſwered for the purſuer: Whatever may be the law of *England* with reſpect to the defence now inſiſted on, it is believed the ſame can be no bar to the action brought here for attaching the debtor's eſtate, in the way and manner as allowed of by the laws of *Scotland*, where ſuch eſtate is ſituated; for, as lands and other heritable ſecurities, *nullam habens ſequelam*, they muſt be regulated *quoad* their conſtitution, tranſmiſſion, &c. by the laws of that country where they are ſituated; thus heritage in *England* is conveyed by teſtament, and a deathbed-diſpoſition will be an effectual conveyance there, liable to no reduction; yet in both theſe particulars

ticulars the law of *Scotland* ſtands quite otherwiſe. It has been ſtated as a doubt, how far an obligation, or other deed executed according to the rules and forms of the country where it received its being, could be available to force execution in another country, where different forms and ſolemnities were required? And the general ſolution, as founded on principles, ſeems to be, That, whatever effect they are allowed to have, it is but *ex comitate*; as no law can be of force *extra territorium*. So far the practice has prevailed, by the cuſtom of nations, and *ex mutua comitate*; for one nation to give execution upon obligations, or other deeds regularly compleated, according to the ſolemnities of that country where they are granted; eſpecially where the like debts or deeds, if contracted or conſtituted in that country where execution is demanded, would have been obligatory and available to the creditor, in the ſame manner as demanded upon the like debts contracted in foreign parts. And, *a fortiori*, where execution is ſought againſt an eſtate in *Scotland*, upon debts contracted by a *Scotſman* reſiding in *England*, the Judges of our law are not called upon to examine whether theſe debts would have received the like execution againſt an eſtate of the ſame kind, in that place where the debts were contracted. If it is a juſt debt, ſuch as would have been available againſt every eſtate pertaining to the debtor, had it been contracted in *Scotland*, no good reaſon can be aſſigned, why ſuch debt, tho' contracted in *England*, eſpecially by a *Scotſman*, ſubject to the laws of *Scotland*, *tam ratione originis quam rei ſitæ*, ſhould not receive full execution againſt every eſtate in *Scotland* pertaining to the debtor. Agreeable to theſe principles, the practice has always been, with reſpect to debts contracted in foreign parts, to give execution thereon, if conſtituted in the manner preſcribed by the law of that country where they received their being, tho' they would not have been good, if contracted here: ſo far the *comitas* has gone, to regard the law of that country where the debts were contracted, as to the ſolemnities required to make them effectual, even in other countries, where different forms were requiſite. But, where the queſtion is not as to the form of the conſtitution, but as to the effect that theſe deeds ought to have in tranſmitting of property, neither the *comitas*, nor the practice of the Court has gone ſo far as to admit of theſe relevant to tranſmit or affect an eſtate in *Scotland* by any way or manner, but according to the rules preſcribed here. In ſhort, there is neither law nor reaſon to reſtrain one nation from enforcing, by legal execution, deeds regularly conſtituted in another country, tho' theſe would not have been available to the ſame purpoſe in the place where they are conſtituted. If a contrary doctrine were to take place, many abſurdities would follow: *e. g.* There is no ſuch thing as arreſtment or adjudication of the debtor's effects or eſtate known in *England*: but, to pretend that therefore none of theſe diligences could be uſed here, upon a debt contracted in *England*, would be attended with many inconveniencies; conſequently, as he has not renounced, he ought to be found liable for the debts ſued on.

The authorities adduced for the defender, were: *Coke* upon *Littleton*, *lib.* 3. § 337.; *Jacob*'s Law Dictionary, word *Heir*, laſt column; *Voet.* in his title *De ſtatutis*, § 19.; *January* 18. 1676, *Cunningham*.

For the defender, *Jacob*'s Dictionary, word *Heir*; *Chanc. rep.* 280, and *rep.* 74.; 9th *December* 1623, *Colonel Henderson*'s children; *Jacob*'s Dictionary, word *Mortgage*.

The Lords ſuſtained the paſſive title of lawfully charged to enter heir; found the defender liable in the L. 100 Sterling, *contained in the above mentioned promiſſory note; and found the other book-debts relevant to be proven by witneſſes.*

N° CXXVI. *Eodem Die.*

Thomas Macdougal contra Mrs. *Barbara Macdougal* and her Husband.

1. *Preſcription both negative and poſitive.* 2. *Act* 1685.

SIR *William Scot* of *Harden* having acquired right to the eſtate of *Mackerſton* (and who appears to have been a truſtee for that family) diſponed the ſame, *anno* 1668, to *Henry Macdougal* in liferent (with ample powers to him, at any time during his life, to ſell, annailzie, and diſpone, *&c.*) and to *Thomas Macdougal* his ſon in fee: on which a charter was expede that year; and, upon the holding's being changed, a new charter, without any alteration in the ſettlement, was expede the year following; and on both theſe charters the father and ſon were infeft. *Anno* 1684, *Henry* execute a bond of tailzie of that eſtate, in favours of himſelf in liferent, and *Thomas Macdougal* his ſon in fee, and the heirs-male of his body, *&c.* This ſettlement contained ſtrict prohibitive and irritant clauſes, limiting *Thomas*, and the whole heirs of tailzie, from burdening the land, alienating or altering the courſe of ſucceſſion, *&c.* *Henry* lived till the year 1692; and, upon his death, *Thomas* his ſon poſſeſſed the eſtate, to which he had right, both by the infeftments 1668 and 1669, and likewiſe by his father's ſettlement laſt mentioned. *Thomas Macdougal* died in the 1701, leaving three ſons, *Henry*, *Thomas*, and *William*, the eldeſt of whom, *Henry*, was not of age till the year 1709, who, neglecting the entail 1684, made up his title to the eſtate, by a ſervice as heir-male to his father; and, in the 1715, executed a new ſettlement, wherein he obliged himſelf to reſign the land in favours of himſelf, and the heirs-male of his body; which failing, of *Barbara Macdougal*, then his only daughter, and the heirs-male of her body, *&c.*

In the year 1722, *Henry* died; whereupon *Barbara* his daughter was ſerved heir of proviſion in general to him, and, in virtue thereof, was infeft. *Anno* 1733, *Barbara* intermarried with Mr. *George Hay*; and, by the contract, Mr. *Hay* obliged himſelf to apply *L.* 1500 *Sterling* towards payment of the family-debts. On the other hand, Mrs. *Macdougal*, with conſent of her curators, provided the eſtate to herſelf and huſband in conjunct fee and liferent, for his liferent-uſe allenarly, and to the heirs-male of her body, *&c.* The tailzie executed by old *Henry* was diſcovered in the 1733; in virtue whereof, *Thomas Macdougal* (uncle to Mrs. *Macdougal*) was ſerved heir of tailzie and proviſion to his father *Thomas*; upon which title, he brought a reduction of the ſettlement made by his brother *Henry*

Henry in the 1715, on his own daughter, and conſequently of her contract of marriage with Mr. *Hay*.

Amongſt other defences, it was *urged* for Mrs. *Barbara Macdougal* and her huſband: That the power or faculty in old *Henry* to make a tailzie in the 1684 was preſcribed, and that the preſcription thereof muſt be held to have commenced from the time the faculty was created or given to him in the 1668; for, as the direct feudal right to the lands was veſted in *Thomas* his ſon, who was the vaſſal of the Crown therein, and by whom the caſualities of ſuperiority muſt have fallen; the powers given to *Henry* was no more than a faculty or burden upon the eſtate of another man; upon which, if no claim is brought to make the exerciſe thereof effectual within forty years after that power is created, the ſame ought to ceaſe for ever, and the eſtate of the liar ſtand diſincumbered thereof, as well as of all other actions or demands, by the general laws concerning preſcription. 2*dly*, The charter and infeftment 1669 has been the ſole title of poſſeſſing the eſtate ever ſince; for the private bond of tailzie, executed by old *Henry*, having never been publiſhed or made uſe of, cannot be accounted his title of poſſeſſion. And, as for *Thomas*, and *Henry* his ſon, and the preſent Lady, their titles were made up in the manner above deduced, upon the footing of the infeftment 1669, which gave the eſtate in fee ſimple to *Thomas* and his heirs; and both *Thomas* and *Henry* acted as heritable proprietors in virtue of that inveſtiture: nay, it does not appear that any of them ever heard of this latent deed; ſo that the eſtate has been poſſeſſed, as a fee ſimple, from the date of the charter 1669, for the ſpace of ſixty nine years, from the date of the tailzie 1684, for the ſpace of fifty four years, and even from the death of old *Henry Macdougal* the liferenter, for the ſpace of forty ſeven years, before any action or claim was brought upon that tailzie, whereby the right thereto ſtands firm and entire by the force of preſcription in the preſent Lady. 3*dly*, It was *objected*, That the entail not being duly recorded, could neither affect Mr. *Hay* or the iſſue of the marriage, who are onerous creditors; and that the irritant clauſes not being ingroſſed in Mrs. *Macdougal*'s infeftment, however this might have irritate her right in virtue of the ſecond clauſe of the ſtatute, yet, in terms thereof, the huſband, having *bona fide* contracted with her upon the faith of the infeftment, which contained no ſuch prohibitions, was ſafe.

Anſwered for the purſuer: As old *Henry*'s powers were engroſſed in the title-deed of the eſtate, it was impoſſible they could be liable to a preſcription. Had he lived to this day, as his power was contained in the only title that his ſon or his heirs could have to the eſtate, he might ſtill have exerced the ſame, he could have cut down the fee of his ſon, and all claiming under him; they had but a qualified right, and they never could plead a preſcription againſt the quality of their own title. Likeas, in the caſe with a reverſion in the body of a right, which, by the nature of the thing, as well as by the ſtatute 1617, admits of no negative preſcription. A vaſſal might, at the ſame rate, pretend to exclude the *reddendo* of his own charter by the negative preſcription. The title of *Thomas* and his heirs made his right precarious, dependent on the will of *Henry* the father; and it is impoſſible that a precarious poſſeſſor, poſſeſſing as ſuch, can plead a preſcription againſt him, under whom he holds his poſſeſſion. Beſides, theſe powers were actually exerciſed, within ſixteen years of Sir *William Scot*'s diſpoſition; ſo that the only queſtion is, If the bond of tailzie is cut out by the negative preſcription? As to which, it falls to be *obſerved*,

ſerved, That by the tailzie *Henry* reſerved his own liferent, as alſo a power to alter; and therefore, and as it is a ſettlement of the ſucceſſion of this eſtate, it muſt be conſidered in this queſtion as only dated in the 1692; for it is impoſſible the preſcription could run from an earlier period; till then no mortal could claim upon it; it is the ſame caſe, as if one ſhould make his teſtament, and ſhould live thereafter forty or fifty years. Is it poſſible to plead that the teſtament could be cut off by the negative preſcription, or that the preſcription could run againſt it before the teſtator's death? Had *Henry* lived till yeſterday, the ſettlement would have had the ſame force, as little hurt by preſcription, tho' made fifty eight years ago, as if it had been execute within theſe three months. And, tho' it be true that, from the 1692, the death of old *Henry*, to the commencement of this action upon this ſettlement, forty years are run; yet, as by the ſtatute minority is excepted, ſo every perſon, to whom preſcription could be obtruded, were minors for near twenty years after the 1692. *Thomas*, the firſt fiar and member of the tailzie, was the perſon who might have been compelled to implement the bond of tailzie, and who was limited by the irritant clauſes, and it was in his favours alone that the preſcription could run againſt the heirs of entail. Now, his ſons, *Henry*, *Thomas*, and *William*, were all minors from the 1692 downward till the year 1711; and therefore theſe years fall to be deduced from the preſcription. Nor can it afford any ground for an objection, that *Thomas*, the firſt member of the entail, was major; and therefore the minority of the after heirs of entail could not ſtop the currency of the preſcription, ſeeing *Thomas* was the perſon bound to implement the ſettlement 1684, and ſubject to the limitations: he pleads preſcription againſt the heirs of tailzie, and againſt the limitations therein contained; ſure the preſcription does run in his favours, not againſt himſelf, but againſt his ſons, the heirs of entail; and therefore it is their minority, and not his, that muſt be conſidered. To illuſtrate this, put the caſe *Thomas* were alive at this day, and that he had made the alteration of the courſe of ſucceſſion contrary to the tailzie; that a challenge had been brought by this purſuer, and that *Thomas* had pled the negative preſcription, would not the purſuer's minority been an interruption? And would it have been a good anſwer, that the defender, who pleaded the preſcription, was major? The negative preſcription is *exceptio temporis*, it is the excluſion of an action by the lapſe of time, it is ſtopt by the minority of the creditor, and the purſuer to whom the action is competent; but, whether the debtor, or the defender who pleads it, is major or minor, is of no manner of importance. 2*do*, No preſcription could run againſt the entail, at leaſt until the 1701, the death of *Thomas*, the firſt member thereof; for, by the infeftments 1668 and 1669, the fee was in him, but with reſerved powers to his father to evacuate the ſame; which powers the father having exerced, *Thomas* ceaſed to be fiar by theſe infeftments, and came to have the right of fee by the ſettlement 1684. And, tho' this deed was not compleated by infeftment, yet it was a good title of poſſeſſion; conſequently his poſſeſſion muſt be aſcribed to it, and not to the infeftments that were ſuperceded by the exerciſe of his father's power. Now, from the 1701, the death of *Thomas*, forty years are not elapſed. 3*dly*, No preſcription could run until the 1722, the death of *Henry*, the purſuer's eldeſt brother, it was only then the ſucceſſion opened to this purſuer upon the entail; till then he was *non valens agere*; and it is a maxim in the law of *Scotland*, *Contra non valentem agere non currit præ-*

ſcriptio.

ſcriptio. See *February* 1666, Earl of *Lauderdale*; *January* 17. 1672, *Young*; *January* 25. 1678, D. of *Lauderdale*; *February* 5. 1680, *Brown*; *December* 13. 1705, *Livingſton.*

With reſpect to the *ſecond* defence, it was *anſwered*: That, as the poſitive preſcription is the acquiſition of the property of a ſubject by uninterrupted poſſeſſion, it is not eaſily comprehended how the ſame can apply to the preſent caſe; *Thomas Macdougal* and *Henry*, who are ſuppoſed to have acquired by the preſcription, were confeſſedly proprietors upon the ſettlement 1684; and therefore, how they could acquire the property of their own eſtate by a preſcription, appears inconceivable; or how they could acquire by the preſcription againſt their own heirs.

At leaſt, this preſcription could not commence till the 1692; this was the date of the commencement of *Thomas*'s poſſeſſion; and, if he was to acquire by preſcription againſt his heirs, ſure their minority muſt be deduced: and, again, if *Henry* his ſon was to acquire by preſcription againſt his brother *Thomas*, his minority muſt deduce out of the years of preſcription, there muſt be ſome perſon from whom the acquiſition is made by the poſitive preſcription, and that party's minority muſt undoubtedly be deduced. Beſides, the maxim *contra non valentem agere* applies to the poſitive, as well as to the negative preſcription, as appears from the deciſions above quoted; wherefore, as the purſuer could not have attained the poſſeſſion, in conſequence of the entail 1684, by any action before the death of his brother *Henry* in the 1722, the poſitive preſcription could not begin to run till that period, conform to which, this point was ſolemnly determined in *January* 1726. *Dundonald.* And, as to the *third* defence, it was *anſwered*: That Mrs. *Macdougal* had no right to the ſucceſſion by the entail, neither with, nor without limitations: that her title depended on a gratuitous deed, which her father had no power to grant, he being reſtrained by the entail; conſequently ſhe can neither plead the not recording, nor her *bona fide* contracting with a party who had not ingroſſed the irritancies in his infeftment: and her right being reduced, her creditors, however onerous, can have no claim againſt the eſtate, in which their debtor has no intereſt. If indeed Mr. *Hay* had contracted with any of thoſe called to the ſucceſſion by the entail, there he might have pled his *bona fides*, the oneroſity of his debt, and the not recording of the entail: but that is not the caſe here.

Replied: The *res meræ facultatis*, which cannot preſcribe, are the powers a man has in virtue of his own dominion or property; but a right that gives him a power over the eſtate of another may be loſt by preſcription, altho' it was optional for him, ſo long as the right ſubſiſted, whether he ſhould uſe it or not; which is the caſe, for example, of all the rural ſervitudes. See likewiſe *Pereſius ad tit. cod. De præſcrip*; 30. *vel* 40. *Ann.* And, if ſuch power were not to preſcribe from its date, it would be harder to be defeated, than if the ſame perſon had the full right of property itſelf in the ſubject. Now, if the preſcription can thus run, it will be no interruption thereof, that old *Henry*, by a private deed, attempted to exerciſe this faculty in the year 1684; for this is but like a creditor aſſigning his claim to a third party, who takes no document thereon againſt the party liable; and, ſince no action was brought upon that deed, nor any thing done in virtue thereof, it is believed, the latent exerciſe of the faculty cannot hinder it to preſcribe. As to the objection, That the preſcription againſt the tailzie could not begin to run until the

year 1722, when *Henry* died, it was *obſerved*: That the eſtate was truly veſted in *Thomas* and *Henry*, and poſſeſſed by them upon the direct title, which made it theirs in full property; the bond of tailzie was unknown to them, and could not be a title of poſſeſſion until a charter had followed thereon; conſequently it was their intereſts, who thus poſſeſſed *uberiori titulo*, to make the ſame good by preſcription, and to acquire an immunity from the fetters impoſed on them by the tailzie; and they having thus poſſeſſed the eſtate *tanquam optimum maximum*, for more than the years of preſcription, there appears to be no juſt reaſon why they ſhould not have the benefit of the ſtatute 1617. Beſides, if the objection were of any force, it would go ſo far that no courſe of time could get the better of it; for, if a ſettlement had been made to heirs-male a century or two ago, upon which, all the while, nothing had followed, but the eſtate continued to be poſſeſſed on the old inveſtitures which were in fee ſimple, and, by ſucceſſion from father to ſon, who were at the ſame time heirs of line, as well as heirs-male, the claim of the heir of tailzie would be ſtill entire and competent upon ſuch antient deed, after the years of the longeſt preſcription had been frequently elapſed, which would be too abſurd to maintain. See 31ſt *December* 1695, *Innes*. As to what is objected, That *Henry Macdougal* laſt of *Mackerſton*, and the purſuer his brother, were both of them minors for ſeveral years after the death of *Thomas* their father, and that, diſcounting their minority, there will not remain forty years, from the death of old *Henry* the liferenter, to the bringing of this action; conſequently no preſcription is run to validate the direct title diſtinct from the tailzie. It was *anſwered*: That, as to the minority of *Thomas*, in whoſe name the claim upon the tailzie is now ſet up, no regard can be had to that; becauſe, even upon the footing of the tailzie, the ſucceſſion would not have opened to him until the death of his brother *Henry* in the 1722, long after his own majority. And it ſeems impoſſible to maintain, That the minority of any one ſubſtitute in a tailzie ſhall hinder preſcription to run againſt it; for, upon that ſuppoſition, no preſcription could ever run; ſeeing, amongſt the various ſubſtitutes in a tailzie, it can hardly occur but that ſome or other of thoſe who are in life for the time muſt be under age; and therefore the perſon whoſe minority is to be conſidered is only he who would be intitled to claim for the time being, even as in the caſe it were a bond containing ſubſtitutions. If the creditor was major, the preſcription would run againſt it, notwithſtanding the minority of the next, or any other ſubſtitutes. It is true, that, by the conception of this tailzie, *Henry* himſelf was the perſon intitled to claim under it; but ſurely his own minority cannot be pleaded againſt himſelf, to hinder the poſitive preſcription from running in his favour, in order to compleat the better and more ample title, under which he truly poſſeſſed it.

The Lords found, That the bond of tailzie 1684 *having lain latent, and not having been claimed upon, or any document taken upon it, for upwards of forty years from the date thereof, and the eſtate having been poſſeſſed by* Thomas *and* Henry Macdougals, *and* Barbara Macdougal *preſent poſſeſſor thereof, for upwards of forty years, in virtue of the diſpoſition* in anno 1668, *and the inteſtment following thereon, they have the benefit both of a negative and poſitive preſcription; and that the tailzie* in anno 1684, *cannot now be ſet up as a title of eviction of the*

the eſtate from the ſaid Barbara Macdougal, *notwithſtanding that* Henry *and* Thomas Macdougals, *her father and grandfather, were heirs by the tailzie* 1684 *years, as well as by the diſpoſition and infeftment* 1668: *and found, That the minority of* Thomas Macdougal, *or of* William Macdougal, *could not interrupt the preſcription, they being only ſubſtitutes by the tailzie* 1684, *and the right thereof not having devolved upon them during their minority: and found, That* Thomas Macdougal, *purſuer in this proceſs, cannot found on the minority of* Henry Macdougal *his brother, in order to prevent the running of the preſcription in favours of* Henry Macdougal *himſelf, and* Barbara Macdougal *who derives right from him: and found, That* George Hay *having entered into marriage-contract with* Barbara Macdougal, *who ſtood ſeized in the lands, by virtue of a progreſs of infeftments, containing no limitation upon her father, and having become bound to advance* L. 1500 Sterling, *towards payment and exoneration of the debts of the family, in contemplation, and upon the mutual agreement of the eſtate's being ſettled upon him in liferent, and the heirs-male of the marriage; the contract was fully onerous, and therefore muſt be available, and ſubſiſt according to the conception thereof, in favour of the ſaid* George Hay, *and the heirs-male of the marriage, notwithſtanding of the latent tailzie* 1684 *years, the ſame having never been recorded, nor any infeftment or document whatſomever taken thereupon.*

Alexander Campbell contra *Elizabeth Fowler*, Relict of *William Macwhiriſh*, and *William Mackie*, her ſecond Husband.

Intromitters with a Defunct's Effects, whether liable to account to his Children as Tutors or Protutors for them.

William Macwhirich, merchant in *Inverneſs*, died without making any will, leaving conſiderable effects, and ſeveral children under pupillarity; upon his death, as none of the relations on the father's ſide were willing to meddle in the children's affairs, *Elizabeth Fowler* his relict having an intereſt in the goods herſelf, applied to the Magiſtrates of that town to have the ſame inventared and appretiated, as alſo that the papers might be ſealed till a title was made up, ſo that her huſband's family might not ſuffer by delay. In conſequence whereof, inventaries were made out (which does not appear to have been ſigned by any perſon) and the goods were likewiſe appretiated. After this, ſhe was decerned executrix, *qua* relict to her huſband: however, a difference falling out (as was alledged) betwixt her and the Commiſſar, anent the extent of the ſubjects to be confirmed, was the cauſe that no confirmation was expede; notwithſtanding whereof, the relict and her ſecond huſband intromitted with the defunct's effects. On which account, *Elſpeth Macwhirich*, one of *William*'s children, brought a proceſs againſt her mother and her ſecond huſband, to account for their intromiſſions; which being aſſigned to *Alexander Campbell*, he inſiſted the defenders ſhould be liable to account as tutors or protutors to *Elſpeth*.

Pled

Pled for the defenders: That none of them were ever tutors to the purſuer, and ſo are not obliged to account as ſuch, neither were they protutors: to make one fall under that character, it is neceſſary that the perſon has immerged himſelf in the management of the pupil's affairs, without any other call than for the intereſt of the minor; and, even in the adminiſtration, he had uſed the name of tutor, which he had no title to do: but in this caſe that cannot be alledged; ſeeing, before the relict intromitted, ſhe applied to the Magiſtrates, ſet forth the ſtate of her huſband's affairs, and craved the goods might be inventared, *&c.*; which was accordingly done: thereafter ſhe was decerned executrix *qua* relict, which ſhowed her *animus* not to act as tutrix or protutrix, and would have expede a confirmation, if it had not been for the difference betwixt her and the Commiſſar. Beſides, ſhe had a conſiderable intereſt in all the moveable ſubjects, *jure relictæ*; ſo that her meddling cannot be eſteemed acting as protutrix for her children, but for her own intereſt; and, tho' her adminiſtration might make her liable as a *ſocia* acting *in re communi*, yet it could never bring her under the character of a protutrix, eſpecially if it be conſidered, that, in the courſe of her, or her huſband's management, they, nor either of them, ever took the name of tutors to the children; when they lifted money that had belonged to the defunct, it was on diſcharges with warrandice; when they paid debt, they took aſſignation or diſcharges to themſelves. See the caſe *June* 10. 1665, *Swintoun*. Neither does the act of Sederunt 1665 make all intromittors liable to count as protutors, but only when their intromiſſion is as ſuch, which implies an acting under the character of tutor.

It was *anſwered* for the purſuer: That, in order to determine the queſtion, Whether the defenders were liable as protutors, it was neceſſary to look into the nature of the management; for this purpoſe it was *obſerved*, That, from the application to the Magiſtrate, it was plain the relict undertook the pupil's affairs, under covert of their authority, as none of the father's ſide would meddle; and that this formality ſhowed ſhe had an eye to the office of tutory, which requires inventaries; but, becauſe there was no nomination of tutory in her favours, nor gift from the Exchequer, nor judicial inventaries made up conſequential thereto, whereby the relict might have been habilely ſtated in the office of tutory; therefore the law characterizes ſuch management a protutory, that a perſon may not profit by neglecting the legal requiſites, and may not be in a better ſituation than thoſe who follow what the law preſcribes, and that minors may not be ruined by means of ſuch officious intromittors. The conſequence of this application further ſhows, that the relict was following out the management in the ſame terms, under colour of a tutory, or as impowered to take it upon her; did not the defenders enter upon the whole effects of the minors, diſpoſe of the goods on hand without diſtinction, uplift the debts due to the defunct, and pay thoſe due by him? Does it not likewiſe appear, from ſome of the receipts and diſcharges produced, granted by the defenders to the debtors, that they diſcharged the debts and accompts due to the defunct, as if they had been owing to the relict, deſigning herſelf therein manager of her deceas'd huſband's affairs? Further, it appears from two diſcharges, that *William Mackie* raiſed principal ſums due to the defunct by bond, in which neither of the defenders had any manner of intereſt; ſo that he could not be acting in that reſpect, but on account of the infant children. It is a jeſt, therefore, to ſuppoſe, that

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one who acts thus in a minor's affairs ſhall term himſelf protutor in the writing granted by him, otherwiſe not be liable in that quality. Such epithet could not create any authority to act, but, on the contrary, diſcover he had none, and ſo embarraſs his management. Beſides, it is plain, from the act of Sederunt 1665, that it is the intromiſſion with the minor's eſtate, and acting in his affairs, that ſubjects the party to the character of protutor; and, if it were otherwiſe, miſerable would be the ſtate of minors: for, to be ſure, the worſe that the intent of the intromittors was, the more careful would they be to avoid taking on the character, whereby they might be brought to an account favourable for the minor. In the *next* place, ſuppoſing the relict had confirmed the whole executry, and managed it in common, it cannot be admitted, that therefore the defenders would not have been liable as protutors, as well as upon the character of executors; ſeeing the making up titles to a ſubject belonging to a minor cannot free the intromittors from the legal effect of being liable as protutors. Nor can the joint intereſt which the relict had in the executry alter the caſe. If indeed the defenders had only concerned themſelves with the ſubject, whereof ſhe had a proportion *pro indiviſo*, and that fell under the communion of goods betwixt huſband and wife, and had confirmed thoſe, ſo as to lie open to a fair charge at the ſuit of the children for their ſhares, there might be ſome colour for not ſubjecting them as protutors for the remaining effects: the neceſſity of the thing might excuſe them, and the children would have undergone no hardſhip in bringing them to an eaſy account.

The Lords found the defenders are liable to account to the purſuer's cedent as tutors or protutors for her.

N° CXXVIII. *July* 20. 1739.

Anabel Ewing Relict of *Patrick Glen*, contra *John Semple*.

1. *A Baſtard may convey his Effects by a general Diſpoſition, if it is not of a Teſtamentary Nature.* 2. *Ambiguity anent the Writer of a Deed.*

Anabel Ewing, as having right to a bond due to her deceas'd huſband, by virtue of a general diſpoſition from him, brought an action upon the paſſive titles againſt *John Semple* for payment. The defences were: 1*mo*, That *Patrick Glen* the creditor in the bond being a baſtard, the purſuer had no ſufficient title in her perſon to inſiſt for payment, ſhe having no particular right thereto, but only a general diſpoſition, which could avail no more than a teſtament would have done. 2*do*, That the bond was null, in regard the writer was not deſigned before inſerting of the witneſſes, as the law requires; and, altho' it were not neceſſary for the writer of a paper to be deſigned before inſerting of the witneſſes, yet it is at leaſt neceſſary that he ſhould be ſome way or other certainly deſcribed, which he is not in the preſent caſe, the bond only bearing in the end of it to be ſubſcribed before theſe witneſſes, *John Buchanan* maltman in *Dumbarton*, and *Adam Colquhoun* ſervitor to *James Duncanſon* at *Garſhake*, writer hereof; which leaves it ambiguous whether *Adam Colquhoun* or *James Duncanſon* was writer thereof.

 Anſwered

Answered for the pursuer: That her title not being revocable, was not of a testamentary nature, but was to be considered as a deed *inter vivos*; that the act of Parliament requiring the designing of the writer, before inserting of the witnesses, was in dissuetude; and that it is plain from the bond, *Adam Colquhoun*, one of the subscribing witnesses, is the writer thereof.

Replied: A bastard by law has no *testamenti factio*; neither can an executor be confirmed to him upon any other title then *qua* creditor; whence it follows, that, as the pursuer's title is in effect a testament, requiring confirmation in order to its establishing a compleat right in the person of the disponee, who cannot be said to be a creditor to the defunct; that therefore there is here no habile transmission of the right, as appears from *Stair*, *p.* 427.; and the decision 28th *November* 1691, *Stewart*, where it was found, *That a bastard's wife having a general disposition from her husband, could claim no right in virtue thereof, but had only that share of her husband's effects that she would have been intitled to by the law, had no disposition been granted.* 2*do*, By the express words of the statute 175. *James* VI. the bond in question ought to be found null, since the writer is not at all designed before the inserting of the witnesses, as that law requires; and the defender is at a loss to understand how it can be said to be in dissuetude; as he believes, from the date thereof, to this day, very few writs of consequence, written by men of knowledge, have omitted the formality there required. But, supposing it might be dispensed with, still the writer should be designed with certainty; whereas here it is quite ambiguous whether *Adam Colquhoun* or *James Duncanson* wrote it, the words, *writer hereof*, being immediately subjoined to his name and designation. Nor will the 5th *act*, 3d *Parl. Charles* II. allow this defect to be supplied by a condescendance.

The Lords repelled the defences, in respect of the answers.

N° CXXIX. *July* 24. 1739.

Mr. *George Buchan*, and *James Winram*, contra Sir *William Cockburn* of that Ilk.

1. *Import of a Creditor's Consent to a Sale of Lands by his Debtor.* 2. *Effect of such Consent, where the Seller is taken bound in the same Deed to procure a Ratification of the Sale from the Consenter.*

ANno 1723, Sir *Alexander Cockburn* of *Langtoun* disponed part of the lands of *Cumlege* (which belonged to the estate of *Langtoun*) to Mr. *Winram*. In the year 1730, Sir *Alexander* sold the remaining part to Mr. *Buchan*, and disponed the same to him as heritable proprietor thereof, with consent of Mr. *Archibald Cockburn* his son; as also with consent of Sir *William Cockburn*, for all right and title he had, or could pretend thereto, either as creditor on the said estate, or any other manner of way whatsomever; the dispositive clause whereof was in the following terms: "Therefore wit ye us, the said Sir *Alexander*, and Mr. *Archibald Cockburn*, with mutual advice and consent foresaid, for our several

" ral rights and intereſts; and alſo with conſent of the ſaid Sir *Wil-*
" *liam Cockburn*, to have ſold, annailzied, and diſponed, from us, our
" heirs, *&c.* to, and in favours of the ſaid Mr. *Buchan*, *&c.*" This diſpoſition likewiſe contained the following clauſe: " And for the ſaid
" Meſſrs. *Buchan* and *Winram*, *&c.* their further ſecurity in the premiſſes,
" and in corroboration of, and but prejudice to the conſent of the ſaid Sir
" *William*, the ſaid Sir *Alexander* and Mr. *Archibald* oblige themſelves,
" *&c.* to procure from Sir *William Cockburn* a valid conſent to, and ratifica-
" tion on a paper a-part of this preſent diſpoſition; as alſo of the former
" diſpoſition granted by them in favours of Mr. *Winram*, for all right or
" title whatſomever which Sir *William* has, or could pretend to the lands
" diſponed to him, by virtue of the rights and debts after mentioned,
" (after which ſome particular debts are ſpecified,) or by virtue of any
" other rights, debts, or diligence, in the perſon of the ſaid Sir *William*,
" affecting, or which might affect the ſaid lands above diſponed, or thoſe
" formerly diſponed to Mr. *Winram*; and which rights, *&c.* are to be parti-
" cularly enumerated in the ſaid ſeparate conſent and ratification, which
" the ſaid Sir *William* ſhall be obliged to communicate to the ſaid Meſſrs.
" *Buchan* and *Winram*, *&c.* and allow them to make uſe thereof in his
" name, for their ſecurity, and defence of their reſpective purchaſes, a-
" gainſt all evictions or incumbrances that may happen to occur." At the date of this diſpoſition, and for ſeveral years before, and after, Sir *Alexander Cockburn*, who was heir ſerved *cum beneficio* to his father, poſſeſſed the eſtate of *Langtoun*, and acted as heritable proprietor thereof; but, as it was well known that the ſame was greatly incumbered, and that Sir *William*, who was a friend of the family, was poſſeſſed of many preferable debts thereon: it was judged neceſſary that his conſent ſhould be adhibited, and likewiſe that the after-clauſe above ſpecified ſhould be ingroſſed. Upon this deed, Meſſrs. *Buchan* and *Winram* brought a proceſs againſt Sir *William*, concluding he ſhould be decerned to convey to them all the rights in his perſon affecting the ſaid eſtate, for ſecurity and defence of their reſpective purchaſes.

Pled for Sir *William*: It is plain from the diſpoſition, the whole price was paid to Sir *Alexander* and his ſon, and no part of it to him; wherefore the queſtion is, What is the natural and legal import of a conſent to a ſale made by another in thoſe circumſtances? As to which, the meaning of ſuch a ſale would ſeem to be none other, than that the conſenter ſhall not oppoſe the ſame upon any right in his perſon, and that he ſhall not compete with the purchaſer thereupon, but allow him a preference to the conſenter's rights, tho' otherwiſe they might be preferable to thoſe acquired by the purchaſer. Let us ſuppoſe, that a creditor who has the only infeftment of annualrent upon an eſtate, conſents to the debtor's granting a ſecond infeftment of annualrent thereon. What can be ſuppoſed to be intended by this conſent, other than that the ſecond creditor is to be allowed to draw his debt out of the lands upon his own right, without any oppoſition from the infeftment of the firſt creditor, tho' preferable? Can any body imagine that the firſt creditor meant, in ſuch a caſe, to tranſmit his debt and infeftment to the ſecond, in order to enable him to poſſeſs the lands upon his preferable right, and thereby to extinguiſh his debt, when he had got no conſideration for ſuch tranſmiſſion, nor adhibited any other concurrence to the ſecond creditor's right, than a *nudus conſenſus*, or *non repugnantia*; ſurely this is too abſurd to be maintained.

tained. And the ſame way, when a conſent is adhibited to a ſale, the import of it is none other than that the creditor conſenting paſſes from his right in ſecurity, ſo far as it affects the eſtate ſold, and reſtricts himſelf to the remaining lands, which he believes may be ſufficient for payment of his debt; or, even tho' they ſhould come ſhort, he yet is bound by his conſent to leave the purchaſer in quiet poſſeſſion, and to take his hazard of recovering his debt out of other ſubjects. But it is obvious, what a wide difference there is betwixt this and a tranſmiſſion of the conſenter's debts; for, if that is ſuppoſed, the purchaſer might attribute his poſſeſſion to the debts conveyed to him, and by his poſſeſſion extinguiſh them: ſo that the conſenter could not afterwards recover payment thereof out of any other ſubject affected by them, or belonging to his debtor; and ſurely no creditor, who knows what he is doing, will agree to the extinction of his debts without payment; a donation, indeed, may be expreſsly made, but it is never to be preſumed, when not expreſſed, and when another rational conſtruction can be put upon the tranſaction. Such is the doctrine likewiſe of the civil law, which expreſsly diſtinguiſhes a conſent from a tranſmiſſion, *aliud eſt vendere, aliud vendenti conſentire, l.* 160. *De regulis juris.* See alſo *l.* 10. *pr. ff. quib. mod. pig. vel hyp. ſolv.*; *Craig, tit. De reſig. et renunt.* § 29; *July* 4. 1665, *Boyd.* Analogous to this are many other deciſions, which have been given upon the conſtruction of conſent in other caſes; which, ſuppoſe it imports no conveyance, for inſtance, it is a rule in law, That *jus ſuperveniens authori accreſcit ſucceſſori:* if a conſenter was conſidered in the eye of law as an author or diſponer, he could not compete with the purchaſer, even upon ſuperveening rights; but the contrary is an eſtabliſhed point, That he can make uſe of a ſuperveening right, even to deſtroy the right conſented to. Again, a conveyance imports warrandice; but a conſenter is never liable in any warrandice. And, if the principles now pleaded for be admitted, he cannot diſcover any other clauſe in the diſpoſition, that can ſupport the concluſion of this proceſs; for, as to the clauſe whereby Sir *Alexander* and his ſon are bound to procure a ratification from Sir *William* to communicate his rights affecting the lands to the purſuers, it does not appear how this can affect the defender, who is no ways bound nor named in it, otherwiſe than as a third party, from whom *Langtoun* elder and younger are bound to procure ſuch ratification. In the *next* place, Suppoſing, for argument's ſake, that Sir *William* had conſented to this obligation, and that it were inferred from thence that he was bound to perform it: now, ſuppoſing even this had been the fact, ſtill it could not be obligatory on Sir *William*, when Sir *Alexander* is only bound in it. But, it is plain, there is no ſuch conſent in this caſe: Sir *William* conſents, indeed, to Sir *Alexander*'s diſpoſition, the import of which has been already explained; but, as to this obligation granted by Sir *Alexander* and his ſon, to procure a communication of the defender's right, he grants no conſent; and ſurely it will not be maintained, That, becauſe he conſented to the diſpoſition, with the view already ſet forth, therefore he ſhould be bound to perform an obligation entered unto by others to procure a conveyance from himſelf, and which could never be intended to be obligatory upon Sir *William*; elſe it had been incongruous to take others bound for it, when it was a thing in his power, had he agreed to it, inſtantly to perform.

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It was *anſwered* for the purſuers: That the import of a conſent to a diſpoſition of property appeared to be a thing as well known and fixed in law, as any point whatever, namely, to make the *dominium* paſs for all right that was in the conſenter, as well as in the principal diſponer. See *l.* 12. *De evictionibus.* And upon the ſame principles it is reſolved, That a proprietor, alienating with conſent of a liferenter, or of a creditor having a pledge in the ſubject, that the full dominion paſſes to the buyer, which conſiſts of the ſeveral intereſts of the diſponer and the conſenters. And, as this would be implied by the naked conſent of one having right to a conveyance made by another, there is yet leſs reaſon to doubt, that the right of the conſenter is transferred, when he concurs or joins with the diſponer, as in the preſent caſe, for all right and title he has any maner of way: for there it is not left to conjecture or implication; but the intention to convey or tranſmit the right of ſuch conſenter is in expreſs words declared. And here the defender concurs, not only in the diſpoſitive clauſe, but, again, in the procuratory of reſignation, which is ſufficient to infer the concluſion of this action: for, as he who diſpones the abſolute property is obliged to deliver the progreſs of titles which he has to the ſame; ſo he who diſpones in virtue of particular rights or incumbrances in his perſon, ought in like manner to make good his diſpoſition, by delivering his titles, if he hath no other uſe for them; and, if he has, by conveying or allowing tranſumpts to the purchaſer. The effect of ſuch conſent is expreſsly declared by our lawyers to be what is now inſiſted for. See *Craig. lib.* 3. *D.* 1. § 29.; *Stair, book* 2. *tit.* 11. § 7. As ſuch is the doctrine of the civil law and our own, it is likewiſe evident, that this was the true meaning of parties. For, as the eſtate of *Langtoun* was ſubject to many incumbrances, beſides thoſe in Sir *William*'s perſon, which were reckoned to be amongſt the moſt preferable, it could ſignify little to the purchaſers, that he ſhould barely renounce any claim upon the lands bought by them, ſince he not being the ſole creditor, ſuch renunciation would ſtill leave them expoſed to the next creditors after him whoſe diligences affected the lands; and therefore his conſent was evidently taken to the end that his titles might ſerve to maintain and ſecure the purchaſers againſt other incumbrances leſs preferable on the ſubject. And, 2*dly*, If more were needful, the intent of parties further appears from the other clauſe in the deed, whereby Sir *Alexander* and his ſon oblige themſelves to procure from Sir *William*, to both the purchaſers, a ſpecial communication of all the titles in his perſon; and, tho' he be not directly an obligant in this clauſe; yet, as it ſtands part of the diſpoſition, which is ſigned by himſelf as one of the parties thereto, it ſeems impoſſible he can evade the force of it, in ſo far as it ſerves to demonſtrate the meaning of his conſent or concurrence, by him adhibited to the diſpoſition itſelf.

And, as to the ſecond part of his defence, That he not being ſpecially obliged in this clauſe, cannot be purſued to perform the ſame, it was *anſwered:* That it was not agreeable to equity or *bona fides* for Sir *William*, who was party to the tranſaction, and concurring with his friends in granting the deed; which contains, in corroboration of, and but prejudice to his conſent, an obligation on his friends to procure from him a ſeparate communication of his titles: to ſay, it is true, I ſigned the deed, but I never meant it ſhould be performed, ſuch a conſtruction would be to render the deed fraudulent and eluſory; but his ſigning the

ſame, containing ſuch a clauſe, plainly implies his willingneſs or conſent to the granting thereof: and the obligation impoſed on the other two was intended merely to free the purchaſers from the trouble or expence of carrying into execution, or obtaining actual performance of that ſpecial communication, which all the parties had in view was to be afforded them.

Replied for Sir *William:* That he was ſo little a party to the ſale by *Langtoun* to Mr. *Buchan*, that he never exchanged a word with him, or any other perſon for his behoof, on the ſubject; neither indeed knows he, to this hour, how much was given for it. It is true, that, at ſigning, the deed was read to him; and, as he had engaged himſelf by promiſe to *Langtoun* to conſent, ſo he was made, to his apprehenſion, only a conſenter thereto: he likewiſe ſaw therein an obligement on *Langtoun* and his ſon to procure titles from himſelf; but he did not dream that he was bound thereby, becauſe his name was mentioned in it as a third party: and ſure it is no ſtretch on the word *procure*, when it is underſtood *purchaſe*; as it is believed every body concerned at the time, underſtood it in that ſenſe: but, if it was meant that the defender was to give theſe tranſmiſſions for nothing, Why was he not taken directly bound to do ſo?

The Lords found, That Sir William Cockburn *is bound to communicate the rights and diligences in his perſon to ſecure Mr.* Buchan's *purchaſe; but found, that this obligement doth not extend to Mr.* Winram, *the other purchaſer.*

But, on the 11th *December* thereafter, *the Lords found, That Sir* William *not being a conjunct diſponer, his conſent imported no more than a* non repugnantia; *and that he was not obliged to communicate his rights,* &c. *to ſecure Mr.* Buchan's *purchaſe.*

N° CXXX. *July* 27. 1739.

David Inglis contra the Repreſentatives of *John Wiſeman.*

1. *A Bill containing a Subſtitution is null.* 2. *Can ſuch a Writing be ſupported by a Proof by Witneſſes that the Money was paid to the Accepter?*

THE ſubject of the diſpute betwixt theſe parties was a bill drawn by *Robert Waddell* upon the ſaid Mr. *John Wiſeman*, in the following terms:

" Pay to me or order, or, failing me by deceaſe, to my ſecond ſon " *Alexander Waddell*, the ſum of, *&c.* the like value received by you, *&c.* " ſigned *Robert Waddell*, accepts *John Wiſeman.*" This bill was indorſed by the drawer to the ſaid *Alexander Waddell*, and aſſigned by him to *David Inglis*, who inſiſted againſt the accepter's repreſentatives for payment.

Objected: The bill is null, as containing a ſubſtitution of heirs; *which objection the Lords ſuſtained.* Whereupon the purſuer endeavoured to ſupport the writing, upon the footing of its being holograph of the accepter

Mr.

Mr. *Wiſeman*. *Anſwered:* That it neither was, nor could be holograph; ſeeing the drawer's name was adjected by the drawer himſelf. However, the Lords, before anſwer, allowed the purſuer "to bring what evidence "he could, that the ſum in the bill was really paid to Mr. *Wiſeman* the "time of granting thereof, and that the ſubſcription thereto is the hand-"writing of the ſaid Mr. *Wiſeman*."

In conſequence of which, a proof was led; at adviſing whereof, the Lords found "proven, that the ſum in the bill was paid to Mr. *Wiſeman*; "and that he granted a bill therefor."

The defenders reclaimed, and *pled:* That a deed drawn in form of a bill, where there muſt be two different ſubſcriptions, *viz.* of the drawer, and of the accepter, could never be holograph of either of them; and, particularly, it could not be underſtood as holograph of the accepter; ſeeing a moſt material part of the writing, *viz.* the ſubſcription of the drawer, cannot be in the accepter's hand-writing. 2*do*, In common language, a deed can never be underſtood as holograph, where the perſon who ſpeaks is not the writer. This is the preſent caſe; the body of the bill may be the hand-writing of Mr. *John Wiſeman*; but then he is there acting the part of an amanuenſis to *Robert Waddell* the drawer: it is *Robert Waddell* who ſpeaks in the bill; and it would be more proper therefore to call it a holograph deed, if it were in the hand-writing of the drawer. 3*dly*, The deed in queſtion is a mutual contract, or it is nothing: it is an order or mandate on the one part, and on the other part a conſent to execute the order or mandate. If the order be formal, and the acceptance formal, it is a good bill; but, if either be informal, it is nothing at all; becauſe the parts relate to one another. It is a mutual contract, the conſent of the one can ſignify nothing without the conſent of the other. The acceptance here indeed is formal; but, if there be no order or mandate, the acceptance muſt go for nothing. Now, it is already found, that there is no evidence of an order or mandate; for *an order to pay money to me, which failing, to my ſecond ſon*, is good for nothing. In the *next* place, witneſſes cannot at all be admitted in a caſe of this nature; becauſe, if the deed in queſtion be a *literarum obligatio*, it is probative of itſelf, and needs not the ſupport of witneſſes, unleſs it be challenged in an improbation. On the other hand, if it does not make a *literarum obligatio*, it cannot be the foundation of an action, it can have no effect in law; it may ſafely be laid aſide, leaving the party who founds upon it to bring evidence of his claim in the beſt ſhape he can: and, when the matter reſts there, it is obvious, that witneſſes cannot be admitted to prove a loan of money, or indeed to prove the delivery of money in any caſe. Than this no maxim is more fixt: nay, the practice of Court goes a great deal further; if a bond be excepted againſt, as wanting ſome of the ſolemnities of the act 1681, it is not found relevant to prove the ſubſcription by the debtor's oath, in order to ſupport the bond; reſting owing muſt be referred to his oath, or nothing. And this is founded on the principles above laid down. Now, this argument concludes *a fortiori* to the preſent caſe. A bond wanting ſome of the ſolemnities of the act 1681, may be a good *literarum obligatio de jure communi*; and it may be plauſibly argued, that, if the debtor owns his ſubſcription, he ought to be barred from making any objection on the act. But, with regard to the preſent point, if the deed purſued on be neither a bill, nor a holograph writing,

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it is absolutely good for nothing; consequently not capable of being converted unto a *literarum obligatio*, by the support of any evidence whatever. And, if it could not be supported by Mr. *Wiseman*'s acknowledgment of his subscription, supposing him alive, but that resting owing behoved to be referred to his oath; far less can it be supported by extraneous witnesses.

The Lords adhered.

N° CXXXI. *November* 6. 1739.

Competition, Mr. *Hugh Murray Kinninmound* Advocate, with Mrs. *Elizabeth Rochead*, &c.

1. *Bond, whether heritable or moveable?* 2. *Where the conventional Terms of paying Annualrents on an heretable Bond, are* Candlemas *and* Lammas. *The Annualrents due at* Candlemas, *before the Predecessor's Decease, belongs to his Executor.*

LEWIS of *Merchiston*, and *Blair* of that Ilk, *&c.* being debtors by a personal bond to Sir *James Rochead*, for *L.* 800 *Sterling*; they (after their affairs went wrong) executed several trust-dispositions of the subjects belonging to them to certain trustees, for behoof of their creditors specially therein recited; amongst whom was Sir *James* for his debt, who alongst with the other creditors, assigned their debts to the trustees, in order that they might lead an adjudication in their name, of the subjects belonging to their debtors, and make over the same to the purchasers. This assignation contained the following proviso: "That Sir *James*'s "granting thereof to the trustees should no ways hurt or prejudge him "of any diligence then already used upon the said bond, or that he should "thereafter use thereon against the persons of the debtors, or others "liable in the same, or any other lands, *&c.* that do or shall appertain to "them, till he is compleatly satisfied, and paid of the sums before writ-"ten: these presents being only granted by me to the said trustees, in "order to make up sufficient rights to the purchaser of the said lands, "for security of the said purchaser." In consequence of this trust-right, the trustees led an adjudication, and sold part of the subjects in Sir *James*'s lifetime; and, after his death, this question occurred betwixt his heirs and executor, Whether Sir *James*'s acceding to the trust-right, and the adjudication deduced in consequence thereof, rendered the bond wholly heritable, so as to devolve to his heirs? or if it still remained moveable, as not falling under the assignation to the trustees, with respect to what part of it is not recoverable out of the trust, as Sir *James*'s proportion of the same?

For the executor it was *contended*: That the trust-rights could not render any of the debts heritable, tho' they were heritably secured; because it is not in the power of the debtor, by any deed of his, to alter the nature of the debts, without the creditor's consent: and, it is plain, that wherever debtors embarrassed denude of their heritable subjects for security and payment of their debts, as not only in trust-rights, but likewise

wiſe where priſoners for debt diſpone their eſtates for their creditors ſecurity, in order to be intitled to the act of grace, a debt may be heritably ſecured, and yet remain moveable as before the ſecurity. Since then truſt-rights by themſelves cannot render heritable ſuch debts as were originally moveable, let us examine, if what followed thereafter, on the part of Sir *James*, can have that effect. With regard to which, it is clear, from the nature of the aſſignment, that the ſole intent thereof was, that an adjudication ſhould be led in the name of the truſtees, of the ſeveral ſubjects of the truſt-right, ſo as they might be enabled to convey the ſame to the purchaſers for ſecurity of their reſpective purchaſes, to the extent of the ſums to be received by the creditors as their proportion of the price, and no further; as this is the caſe, it is the very ſame, as if Sir *James* himſelf, without leading any adjudication, had received his proportion from the purchaſers, or truſtees on their account, of the price of the ſubjects, and granted an aſſignment of his bond, with abſolute warrandice as to the ſum received, and with power to the purchaſers or truſtees for their behoof, to lead an adjudication of the ſubjects, for ſecurity of their reſpective purchaſes; ſurely ſuch an adjudication led upon the bond, would not render it heritable as to the remainder ſtill unſatisfied. Now the caſe in queſtion is in effect the ſame. Sir *James* conveys this debt to the truſtees to a limited effect, *That an adjudication may be led thereon in their name*, to be made over to the purchaſers in ſecurity of their purchaſes, and with power to bind Sir *James* in abſolute warrandice as to the proportion of the price to be received by him; and at the ſame time, reſerving the debt to all other intents and purpoſes, which is no more than conveying the debt by way of anticipation to the purchaſers, with abſolute warrandice as to the ſums received, reſerving the bond as to the remainder; and with power to the purchaſers to lead adjudication upon the ſame, ſo far as conveyed for ſecurity of the purchaſers. Whence it is plain the debt was never intended to be heritably ſecured in Sir *James*'s perſon, or for his behoof, by leading the adjudication further than to the extent of the price of the ſubjects.

It was *anſwered* for the heirs, That no ſuch anomolous right occurs in law, which is at the ſame time heritably ſecured, and yet moveable to all other intents and purpoſes. "If a debt is heritably ſecured, it muſt neceſſarily deſcend to the defunct's heirs; nor is it poſſible for his executor to make up a title to it. Neither is the inſtance of an heritable ſecurity granted by the debtor, without the creditor's conſent, an example to the contrary; becauſe, if the creditor refuſe to accept of it, the debt cannot be ſaid to be heritably ſecured; and conſequently, there is no place for its deſcending to the heir: But if the debt can at all be ſaid to be cloathed with an heritable ſecurity, the deſcent to the heir is an unavoidable conſequence, ſeeing he only can ſucceed in the real right, and the debt muſt go along with it, as the *jus nobilius*. Nor is a formal acceptance of the creditors neceſſary for this purpoſe: If the creditor knows that the additional ſecurity is granted, he is preſumed to accept of it. But in the preſent caſe, there is no occaſion for this diſquiſition, as Sir *James*'s acceptance of the truſt ſecurities, is not left to preſumption or conjecture, but is plainly proved by his concurrence with the truſtees in every ſtep of their management, by keeping their meetings, by aſſigning the debts in queſtion, and, in a word, doing every

thing which any other creditor did who acceded to the truſt-right; conſequently theſe truſt-rights muſt be conſidered in the ſame view, as if they had been granted directly to Sir *James* himſelf; in which caſe, there could be no doubt the debt thereby ſecured would be heritable to all intents. And as to the argument, that no more can be deemed heritable, than to the extent of what may be drawn by the ſubjects ſtill undiſpoſed of, it was *anſwered*, That when a debt is heritably ſecured, however ſmall the ſubject is over which the ſecurity extends, that the whole is thereby rendered heritable, ſince every part thereof is equally ſecured upon land, tho' the ſubject may be too ſmall to pay the whole: Becauſe, as the heritable ſecurity applies equally to the whole debt *pro indiviſo*, it muſt of conſequence be wholly reputed heritable: And it is inconſiſtent, that it ſhould be held to be both heritable and moveable at the ſame time; or that the nature of it ſhould depend upon any after chance of the debt being recovered in one manner or another. And with regard to the argument, that the aſſignation was only intended for an additional ſecurity to the purchaſers, and to be conſidered as their right and evident, but not at all to alter the nature of Sir *James*'s debt; it was anſwered, 1*mo*, It is not by the adjudication that Sir *James*'s debt was rendered heritable, but by the diſpoſition and infeftment in ſecurity, taken by truſtees for his behoof, a conſiderable time before the adjudication was led, and by which the debts were rendered heritable, though the ſame had never been deduced. 2*do*, The adjudication is not rightly repreſented, when it is conſidered as a ſecurity only belonging to the purchaſers, and not to Sir *James*: For it did not belong to the purchaſers, till it was made over to them upon the ſales of the ſeveral ſubjects; till then, it was in the perſon of Sir *James*'s truſtees, which is equal as if it had been in his own; and though he empowers them to make over the ſame to the purchaſers, that is no more than what every creditor is bound by law to do.

Another point occurred betwixt theſe parties, which was this: In ſome of the heritable bonds due to Sir James, ſecured by infeftment, the annualrent was taken payable at two terms in the year, *Candlemas* and *Lambas*. Sir *James* died the 1ſt of *May* 1737, conſequently the executor pled, that the half-year's annualrent that was payable at the *Candlemas* preceeding, if not the annualrents to the day of his death, fell under his executry. In ſupport whereof, it was obſerved, That annualrent ſecured by infeftment, though payable termly, muſt either be due *de die in diem*, and ſo the executor's right will go to the day of Sir *James*'s death, or they muſt only be underſtood to be due termly, when they are exigible, and then the conventional terms that were paſſed before his death, fell under his executry. Annualrents, which are termed *fructus civiles*, in whatever manner they are ſecured, grow due from day to day, tho' they are not exigible till the term covenanted. And there is nothing better known in law than the diſtinction betwixt *diem cedere* and *diem venire*; by the firſt, the obligation becomes due, and is tranſmiſſable; ſo that ſince the annualrents becomes due by the uſe of the principal ſum, and forbearance of exacting it, every day's uſe muſt produce a new day's intereſt. This infallibly holds in moveable bonds; and there does not appear any ſolid reaſon why it ought not to take place in annualrents conſtitute by infeftments; but if thoſe ſhall be deemed only due termly, then it would ſeem paſt doubt, that all the bygone

bygone terms due at the defunct's death fell under his executry; theſe were ſums exigible by the defunct himſelf: And whether the terms of payment were, by the agreement of parties, or thoſe called legal, cannot alter the caſe; for ſtill the term's annualrent was paſſed, and muſt be regarded as a ſum in the defunct's own hands. *Anſwered*, The annualrents were not to be computed *de die in diem*, but to be regulated by the legal terms of *Whitſunday* and *Martinmas*, in the ſame way as the rents of the lands, ſince there is no reaſon why that rule, which has been wiſely eſtabliſhed for preventing many diſputes which would otherwiſe happen anent the conventional terms, ought to be departed from. The reaſon why annualrents or annuities are made payable at by-terms, as *Candlemas*, *Lammas*, &c. is to anſwer the terms the tenants pay their rents; and as thoſe conventional terms of payments are juſtly diſregarded in the queſtion of the heritor's ſucceſſion, as little ought they to have any influence in the ſucceſſion of the real creditor, who has a partial intereſt in the lands, conform to the deciſion, 12th *Jannary* 1681, Lady *Craigleith*.

The Lords found, That the bond in queſtion was rendered heritable, and remained ſo at Sir James's *death, except in ſo far as he was intitled to draw of the ſums therein contained, out of ſuch of the ſubjects as were ſold and diſpoſed of by the truſtees before his death; and found, That the annualrents due at* Candlemas, *preceeding Sir* James's *death, do belong to his executors.*

N° CXXXII. *November* 6. 1739.

Katharine Hood contra *James Jack.*

Effect of a marriage diſſolving within year and day, without iſſue.

BY contract of marriage, dated in *January* 1736, betwixt *Katharine Hood* and *George Jack*, ſhe and curators became bound to pay 907 pounds *Scots*, in name of tocher. 2*dly*, *James Jack*, father to *George*, therein obliged himſelf to pay to his ſon the ſum of 2000 merks againſt the *Whitſunday* thereafter. *James* the father, ſoon after the marriage, died, and before the term of payment of the 2000 merks; whereupon *George* his ſon ſucceeded to him, and made a new ſettlement in favours of his wife, in which he aſſigns her, *inter alia*, to the two thouſand merks due by his father. This marriage diſſolved by the death of *George* the huſband within year and day, without iſſue. Whereupon *Katharine* brought an action againſt the repreſentative of *James*, for payment of the 2000 merks. *Pled* for the Defender, That the obligation aſſigned was granted by the huſband's father to him his only ſon, in contemplation of the marriage: That the marriage having diſſolved within year and day, and without iſſue, the obligation was void in the ſame manner, as if the marriage had never been contracted; and as the aſſignation contained only warrandice from fact and deed, neither the huſband nor his repreſentatives were bound to make good the deed that had ſo become

become void to the purſuer. In ſupport of this defence, it was obſerved, 1*mo*, That all obligations entered into, in contemplation of a marriage, are properly conditional obligations, and have no effect if the marriage never follow. That this takes place not only in obligations entered unto betwixt the perſons to be married, but alſo in ſuch as are granted by third parties to either of the married perſons in a contract of marriage, *intuitu matrimonii*; ſuch obligations are not ſimple, but conditional; they are granted with a view to the marriage, and in order to enable the parties to live more comfortably in that ſtate; and if the marriage never follow, the end of the obligation, aad the condition upon which it was given, falls. Thus its believed, no body ever imagined, that when a father binds himſelf in his daughter's contract of marriage to pay a certain tocher, it is in her power to break up the marriage, and to force her father to pay the tocher. 2*do*, It is equally certain, and eſtabliſhed by our ancient cuſtom, that the condition of the marriage after-following, in theſe caſes, is not to be conſidered as *in puncto*; that it is not underſtood to be fulfilled by the performance of the ceremony, or the parties living a day or two after it; but that it has been thought proper that it ſhould ſubſiſt for ſome reaſonable ſpace of time, in order to give proviſions, made in contemplation thereof, whether by law or paction, their full effect; and that ſpace of time has alſo, by our cuſtom, been defined to be a compleat year, or year and day; ſo that if the marriage diſſolve within that ſpace, the caſe is the ſame as if it had never followed; nor is there any exception to this doctrine, but where there is an expreſs clauſe inſert in the contract, that the proviſion ſhould take place, though it ſhould ſo diſſolve.

Pled for the purſuer, That deeds granted in contemplation of a marriage, in favours of either of the parties-contracters, are underſtood to imply a condition, if marriage follow; and that if no marriage follow, the grants become void, and that poſſibly, without diſtinction, whether the grants proceed from the married parties themſelves, or from third parties. But the caſe is quite different, with reſpect to the after diſſolution of the marriage; the contracting of the marriage purifies the condition, and makes the deeds granted *intuitu matrimonii* effectual: And there is nothing in the nature of things that can diſtinguiſh betwixt a marriage ſubſiſting for ſix months, and for as many years; and if there is iſſue of the marriage, it is even by the law of *Scotland*, as effectual an implement of the condition when it ſubſiſts but ſix days, as if continued for ſix years; ſo that the effects given to the diſſolution of the marriage within year and day, and without iſſue, are peculiarities in the law of *Scotland*. Now, if the origin of this matter, of the return of the proviſions of the huſband and wife, made *intuitu matrimonii* is looked in to, it will be found to have been introduced from the civil law, without any foundation in the analogy of ours, as the tochers and proviſions made to wives with us, whether by law or paction, have not the leaſt reſemblance to the *dos et donatio propter nuptias* of the common law. It is true, that for a great while back, the proviſions in favours of the wife have been conſidered to ſtand upon the ſame principles with the tocher; that both became ineffectual, and return to the granter upon the diſſolution of the marriage within year and day; yet it is apparent, that the proviſions made by the huſband's father, not to the wife, nor to the iſſue of the marriage, but to the huſband his own ſon, ſtand upon a quite different foundation,

foundation, and falls to be governed by different rules: It is none of the mutual ſtipulations in the contract of marriage, but among the parties-contractors on the one ſide among themſelves; and therefore, it is not eaſy to conceive upon what ground the diſſolution of the marriage ſhould diſſolve ſuch a contract that did not paſs betwixt the married parties, but betwixt one of them and his own father; which is the caſe here, the father being bound to pay to his own ſon, his heirs, executors and aſſigns, 2000 merks at *Whitſunday* enſuing, without any obligation on the father in favours of the wife, or the iſſue of the marriage; and that the ſon, and he only, is bound to ſecure the preſtations to the wife: Therefore no good reaſon can be given, why the diſſolution of the marriage ſhould affect the father's obligation to his own ſon, in which his ſon, and he only, was creditor.

And tho' it were to be ſuppoſed the father had a faculty to revoke this obligation in the event which afterwards happened, that faculty died with himſelf, and his eldeſt ſon, who ſurvived him, had the right abſolutely in him. In the *next* place, giving, but not granting, that this proviſion by the father to the ſon, was to return to the ſon upon the diſſolution of the marriage, without any revocation; yet, upon the father's death, before the diſſolution, this conditional return deſcended to the ſon, his only child, and he had ſufficient powers to diſpenſe with the ſame: Now, as by the aſſignation in queſtion, he has conveyed this ſpecific debt in favours of his wife, with warrandice from fact and deed, it is impoſſible that he, or any claiming under him, can plead the return thereof, and ſo annul the conveyance which he has made. The aſſignation contains no condition, if the marriage ſhall ſubſiſt year and day; and none is implied in an aſſignation of this ſort, whatever may be the caſe of a contract of marriage; and therefore, as he is barred by his warrandice from pleading the return of the debt aſſigned, ſo his heirs are in the ſame way bound: Warrandice from fact and deed, implies *neque per ſe, neque per heredes ſtare*, that neither he nor his heirs ſhould ſtop the deed's being made effectual.

Replied for the defender, There is no diſtinction whether the proviſions are granted by one of the married perſons to the other, or by a third party, or to which of the married perſons they are granted: The only characteriſtic to be looked for is, Whether they are granted in contemplation of the marriage? For if that is the caſe, from whomſoever they proceed, they muſt depend upon the condition of the marriage actually following, and ſubſiſting for the legal ſpace; and as to the argument, that the proviſion in queſtion is only payable to *George* the huſband, and as no liferent thereof is provided to the wife, nor fee to the children, they have no intereſt therein, conſequently it is not to be conſidered as a part of the marriage-ſettlement, which falls to return upon the diſſolution.

It was *anſwered*, That this muſt be conſidered as a part of the marriage-ſettlement, being the only proviſion granted by the father to his ſon, and granted expreſsly in contemplation of the marriage, which, from the nature of the thing, implies a condition, that the marriage ſhall follow and ſubſiſt during the legal ſpace, whether the wife and children are provided to it or no. Suppoſe a father diſpones a greater eſtate to his ſon, than is liferented by his wife, or provided to his children; yet ſurely it will not be ſaid, that the ſon could break off the marriage, and keep the remaining eſtate to himſelf, while

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that part, which was provided to the wife and children, is admitted to return to the father, there is no reaſon for ſuch diſtinction.

Laſtly, It was obſerved, that the aſſignation was no more than a gift of the proviſion promiſed by the father, ſuch as it was, without warranting it to be good and effectual; if it is due, the aſſigney has right to it; if it is liable to objection, ſhe muſt take it as it ſtands: She has right to it ſuch as it is, but has no obligation upon her huſband, or his repreſentatives, to make it better than it is. In ſome events it might have been good, *viz*, if the marriage had ſubſiſted for year and day, or if a child had been born; but the contrary event has happened, which makes it void, and the purſuer has no obligation upon her huſband to warrant her againſt that event; and therefore muſt ſubmit to the effect of it.

The Lords found, That the obligation by the father James Jack *to the ſon* George, *in his contract of marriage with* Katharine Hood, *became void, the marriage having diſſolved within year and day without iſſue; and found, That the aſſignation by* George *to his wife, was ineffectual; and therefore aſſoilzied. But upon a reclaiming petition and anſwers, The Lords found, That the obligation whereby* James Jack *the father was obliged to pay to* George Jack *the ſon,* 2000 *merks in his contract of marriage with* Katharine Hood *the purſuer, the ſame not being conveyed to the wife, or the iſſue of the marriage, did not become void by the marriage diſſolving within year and day.*

N° CXXXIII. *November* 9. 1739.

Competition, *Daniel Forbes* with *Alexander Innes.*

Indefinite payment.

PAtrick Crawfurd being debtor to *Robert Gordon*, by a promiſſory note, he indorſed the ſame to *Daniel Forbes*, and *Alexander Innes* being creditor to *Robert Gordon*, arreſted in Mr *Crawfurd*'s hands, the money due by him to *Robert Gordon* on the promiſſory note; whereupon a competition enſued betwixt the indorſee and arreſter, in which, upon an alledgeance that *Innes*'s debt was extinguiſhed by ſeveral payments made to him by *Robert Gordon*, *Innes* compeared, and acknowledged the payments, but contended, That the debt acclaimed by him was not thereby extinguiſhed, ſince he had applied theſe payments to a debt due by Sir *John Gordon* of *Embo* to him; for payment of which debt, *Robert Gordon* alſo ſtood bound, conform to a letter addreſſed to Mr *Innes*, of the following tenor: *You'll ſiſt diligence againſt my brother, and I, by theſe preſents, become bound to you to ſee the utmoſt ſhilling (of his bill) paid, if you ſignify the ſame to me by a letter in the courſe of the poſt, &c.* In conſequence of this letter, Mr *Innes* diſcharged the proceeding in diligence againſt Sir *John*, and acquainted *Robert Gordon* that he had done ſo. Theſe being the facts, the queſtion betwixt the parties was ſhortly, Whether Mr *Innes* could apply and impute the indefinite payments made by *Robert Gordon*,

Gordon, to the extinction of Sir *John Gordon*'s debt in the firſt place, without giving any credit to *Robert Gordon* for what he was owing on his own account.

For *Innes* it was *contended*, That his party had no right to quarrel the application of the payments; for he had no title to the promiſſory note in queſtion, in regard the indorſation in his favours appears to have been blank, and his name filled up with his own hand; ſo that the indorſation thereto fell under the act anent blank writs. And with reſpect to the indefinite payments, it was obſerved, That there was no expreſs conſtitution relating thereto; the matter reſted upon natural equity; and that there it was put by the *Roman* law allenarly, which did not expreſsly ordain how indefinite payments were to be applied, but laid down this rule of natural equity, that the application ſhould be in ſuch manner as was leaſt to the prejudice of either party; and here it would be manifeſtly to the prejudice of the creditor, to apply all the payments in the way contended for by Mr *Forbes* to elude the effect of Mr *Innes*'s diligence. See the firſt four laws, *ff. de ſolu.* In the *next* place, the rules touching indefinite payments, do not at all apply to this caſe; for that no payment can be condeſcended on, but what was directly applied, and a receipt given for it, declaring that the ſame was imputed to accompt. And here it fell to be taken notice of, that *Robert Gordon*'s letter could not be interpreted, as if he had undertaken as cautioner for his brother Sir *John* to be liable in caſe of his not paying; the contrary appears, for, that in the ſame letter, wherein he undertakes the debt, he mentions his intention of making immediate payment, and that he was to pay Sir *John*'s debt out of a cargo of corn which he was then ſending to *London*, the proceeds of which having failed, he was in uſe thereafter of impreſſing funds into Mr *Innes*'s hands, which funds *Robert* conſidered as coming in place of the proceeds of corn which had failed; ſo that he looked on himſelf as in the courſe of paying his brother's debt, as well as his own.

On the other hand, it was argued for *Daniel Forbes*, That the obligation in the miſſive letter was only conditional, and afforded no more at beſt, but a ſubſidiary action againſt *Robert Gordon*, in the event that Mr *Innes* did not recover his payment from Sir *John*, ſince it could not be pretended that the obligation was a conſtitution of Sir *John*'s debt againſt *Robert*; and therefore Mr *Innes* could not poſt theſe payments regularly to the credit of a debt not due by him, or conſtituted againſt him. 2*do*, Even ſuppoſing the obligation was binding, nevertheleſs, the application ought to have been made to the extinction of *Robert*'s proper debt. 1*ſt*, Becauſe the payment being indefinite and to account, and neither party having expreſſed themſelves at the time of the payment, how the ſame ſhould be applied, the law rules the application, and imputes it rather to the extinction of a debt owing *proprio nomine*, whereof the term of payment was come, than for what was owing *alieno nomine*. And as in this caſe Mr *Innes non ſtatum dixit* when he received the indefinitive payments, but only poſted them in general to account, the imputation ought to be made to the extinction of that debt, *ex qua tamquam ſolvebat ad ſolvendum compelli poterat*. See *Voet. tit. de ſolu. et liber.* § 16. *l.* 1. *c.* 2. *ff. h. t. l.* 1. *c. h. t. Ant. Fab. cod. lib.* 8. *tit.* 30. *Diſ.* 31. And *Carpſ. defin. in forenſ.* part 2. *conſt.* 29. *defin.* 17. *Juris c. Holl.* part 3. vol. 1. *conſil.* 145. *queſt. ult.*

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The Lords found, That the imputation of the payments made both before and after the arreſtments, muſt be to Sir John Gordon's *debt, and not to the debt on which the arreſtment was uſed.*

N° CXXXIV. *November* 14. 1739.

Competition, Mrs *Helen Cunningham* with the Creditors of *Henry Cunningham* of *Boquhan*.

Faculty to burden.

William Cunningham of *Boquhan*, in his ſon *Henry*'s contract of marriage, diſponed to him the eſtate of *Boquhan*, reſerving (amongſt other powers) a faculty to burden the ſame with 10,000 merks payable at his deceaſe, which clauſe was repeated in the procuratory, precept and ſaſine that followed thereon. And *William*, in a contract of marriage with his ſecond ſpouſe, exerciſed this faculty, by burdening the ſaid eſtate with that ſum to the bairns of that marriage, conform to the reſervations, powers and faculties reſerved in his ſon's contract, and thereafter *William* aſſigned and diſponed to Mrs *Helen Cunningham* his daughter of the ſecond marriage, the ſaid 10,000 merks, and which diſpoſition was regiſtrate in the Sheriff-court-books of *Stirling*.

Henry contracted ſeveral perſonal debts after his father's deceaſe; and in a ſale of the eſtate, the queſtion occurred in the ranking the creditors, Whether the reſerved faculty as to the 10,000 merks exerciſed in manner foreſaid, was a real burden upon the eſtate, preferable to all the debts of *Henry Cunningham* the diſponee.

Pled for Mrs *Cunningham*, That her father old *Boquhan*, was a real creditor in the faculty, to the extent of the ſaid ſum, whenever he pleaſed to exerce the ſame; this conditional credit competent to him againſt his ſon upon the ſubject diſponed, did as much affect the fee, and could as little be defeated or voided by the deeds of the ſon, as if it had been a pure and unconditional debt. It has indeed been often diſputed how far general burdens could be effectual againſt ſingular ſucceſſors in the ſubject, tho' even conceived in a real manner, as a burden thereon, and always given in favours of the general burdens, till of late, that the conſideration of the lieges ſecurity from the records might not be impaired, has made the Court reverſe theſe judgments. But theſe later precedents cannot affect this queſtion; for here the preciſe ſum is aſcertained, as likewiſe the creditor in the faculty, who was *Boquhan* elder, himſelf. It is true, this faculty might have been exerced in favours of perſons unknown, and whoſe right could not be diſcovered from the records, which are intended to certiorate the lieges, *viz.* that of ſaſines and reverſions, and conſequently the regiſtration of Mrs *Cunningham*'s right in the Sheriff-court-books, cannot be much relied on. But the argument proves too much, and ſo is of little avail. For had this been an actual reſerved ſum of 10,000 merks to old *Boquhan*, it might have been aſſigned to any perſon whatever, by a mere perſonal deed, and be effectual to the aſſigney; and conſequently the aſſigney's right

right could not appear upon the record of ſaſines and reverſions, more than that of the perſon in whoſe favours this faculty is exerced. In ſhort, the nature of this reſervation is ſuch, that it would ſeem no more was requiſite for converting the faculty to a real burden, but ſuch deed as appears in old *Boquhan*'s contract of marriage, declaring, that he burdened the lands with that ſum; it would have been altogether inept if *Boquhan* elder had granted an infeftment of annualrent, or the like ſecurity upon the land, after he was denuded of the eſtate, and his ſon publickly infeft, and which was the intention when the faculty was reſerved; ſo that the meaning could not have been, that he was to diſpone the lands in ſecurity, or an annualrent out of them, correſponding to the 10000 merks, eſtabliſhed by a ſaſine lawfully execute: he was already denuded, without power of revocation, of the fee of the eſtate, by an actual deed lodged in the ſon, which therefore he could not affect in that manner.

On the other hand, it was argued for the creditors, That the reſerved faculty in the ſon's contract was indeed a real burden upon, or power reſerved to the father over the eſtate diſponed, whereby he might have granted warrants for infefting any perſon he pleaſed, in the ſame way he could have done, if he had remained proprietor in full fee of the whole eſtate, or in the ſame way he could have done if he had been infeft over the whole upon an heritable bond for the ſum in the faculty: but in all theſe caſes, the father muſt have proceeded in the known regular manner of granting infeftments by procuratory, *&c.*; for no declaration in writing, or aſſignation in favour of a third perſon, without theſe, can produce a real and preferable right upon lands to ſuch third party, whether the granter of ſuch declaration or aſſignation be infeft in the eſtate as proprietor thereof, or as creditor by heritable bond, or as having a faculty to burden it. It is true, that Mrs *Cunningham*, as a perſonal creditor to her father, or as his aſſigny by perſonal deed, had it in her power, by adjudication proceeding on the ſaid perſonal deeds, to have attained infeftment upon the eſtate, valid to the extent of the faculty, and preferable to other rights affecting the ſame, according to its order of time; exactly as any man's perſonal creditors or diſponees by perſonal deeds, wanting procuratory and precept, may attain, by a proper courſe of diligence, valid infeftments on the eſtate, or real rights in which their debtors or authors ſtand infeft: but it is quite inconſiſtent with the nature of our real rights, to admit that any real or preferable right on lands can be eſtabliſhed or conveyed unto the perſon of a third party, either in virtue of a faculty, or of a right of property, or real credit, without actual infeftment recorded in the proper regiſter in favour of ſuch perſon. Beſides, this faculty did not import a reſervation of any part of the eſtate, whereof the fee was conveyed to the ſon, which could, with any propriety, be called a ſeparate eſtate in the father different from that which was conveyed to the ſon, ſo as to remain unaffectable by the ſon's creditors; but imported only a power in the father to affect the eſtate with real rights to the extent of 10,000 merks in virtue of the faculty, as well as the ſon might affect it in virtue of his fee. So that it might have been affected by either of them, if the ſame had been done in the proper form of conſtituting real rights; but that being neglected, it could not be affected by the deeds of either, otherwiſe than by a courſe of legal diligence, in

which the rule of preferance would be *prior tempore potior jure.* And, as to the notion, that the faculty was aſſignable by perſonal deeds of the father, ſo as to eſtabliſh the right in the aſſigney, the creditors conceive that to be altogether inconſiſtent with the forms made eſſential by our law for the tranſmiſſion of real rights.

The Lords preferred Mrs Cunningham *to the perſonal creditors of her brother.*

N° CXXXV. *November* 16. 1739.

Patrick Davidſon contra *Alexander Watſon* of *Glentarky.*

Triennial Preſcription.

ALEXANDER *Watſon* of *Glentarky*, having an only daughter *Margaret, Watſon* ſettled his eſtate of *Glentarky* upon her, and failing her, to *Alexander Watſon*, 2d ſon to *Watſon* of *Aitherny*. In this deed, he named *Aitherny* tutor and curator to his daughter. After *Glentarky*'s death, his widow married Provoſt *Davidſon*, who took home his ſtep-daughter *Margaret Watſon* to his houſe, and alimented her for the ſpace of 9 years. Upon her death, while a minor, *Aitherny*, as adminiſtrator in law to his ſecond ſon *Alexander*, who ſucceeded to the eſtate, granted a bond to Provoſt *Davidſon* for 4000 merks, in conſideration of the aliment due to him for *Margaret Watſon*; but when *Alexander* came to be of age, he reduced both the bond granted by his father, and likewiſe a bond of corroboration thereof, which he had granted, on the head of minority and leſion. After this, *Patrick Davidſon* (the Provoſt's ſon) to whom theſe bonds had been aſſigned, brought an action againſt the ſaid *Alexander Watſon* (*Margaret*'s heir) for payment of the foreſaid aliment. The defence was the preſcription introduced by the 83d Act. 6. Parl. *James* VI. which enacts: "That all actions "of debt for houſemails, mens ordinary, ſervants fees, merchants "accompts, and other like debts that are not founded on written "obligations, be purſued within three years, otherwiſe the creditors "ſhall have nae action, except he eather preive be writ, or be aith of "his party."

To ſupport this defence, it was obſerved, that if aliments of this kind, which chiefly conſiſt in a maintenance in meat and drink from day to day, is not comprehended under the words of the Statute *mens ordinarys*, it is believed they are very near a kin to it, and ſo fall under the general words, *other the like debts.*

Anſwered, Provoſt *Davidſon* kept no ordinary; he did not furniſh victuals, neither by retail, nor by quarters, nor half years; and therefore, he does not fall under any expreſſion in the Statute. Nor does his claim fall under the indefinite clauſe of *other* like debts; the only debts mentioned in the Statute are debts in uſe to be paid with ready money, and without taking diſcharges in writing: Of this ſort are all the particulars mentioned; and it is upon this account that the preſumption of payment within the three years, the preſcription of this Statute

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is introduced. Such is the caſe of houſe-mails, tavern-bills, board payable to thoſe that keep boarding houſes, *&c.* but aliment and education furniſhed to minors, as they are due without paction, ſo they are not liquid, and need to be modified by the minor after majority, or by a judge; ſo they are not in uſe to be paid by the tutors or curators without a written document; and therefore they do not fall under the reaſon of the Statute. The minor has no fund out of which he can make payment, his effects are in the hands of tutors and curatots, and they are accountable for the ſame; ſo that if they pay without a written document, they loſe their money: And therefore the debt cannot be paid without writ; conſequently, if there is no written document of the payment, the preſumption is, That the debt is outſtanding, which holds in the ſtrongeſt manner in the preſent caſe, where not only there is no document granted to the tutor of payment, but the tutor grants an expreſs declaration that no payment was made, but that the aliments were reſting owing. And in order further to explain the import of this Statute, it will be conſidered, that the ſame is not a peculiarity in the law of *Scotland*; the like Statute was made by the Emperor *Charles* the 5th in the 1549, as alſo in *Frieſland* in the 1511; and it is obſervable, that neither in our Statute, nor in that of *Frieſland*, is any debt mentioned, but what is founded either upon a ſale, or a *locatio conductio*. Now, as aliment and education, furniſhed to a minor without paction, is not a contract of that ſort, but a *negotium geſtum*, it would be extending the Statute to caſes no ways ſimilar, but unlike to thoſe expreſſed, ſhould the preſent action fall under the ſame, ſince it has always been held, that ſuch furniſhing to minors of aliment and education were liable to no ſort of preſcription, but that of 40 years.

Replied: The purſuer's reaſoning tends to reſtrain the act ſimply to the particulars therein mentioned, and to throw out the general words, contrary to the genious of our law: Thus, although merchants accompts, are only mentioned in the act, the Lords have often found it reaches to accompts of brewers, bakers, *&c.* yea even to the accompts of writers: And it muſt be obvious, there is, at leaſt, as cloſe a connection betwixt mens ordinary and aliment or entertainment, commenced with or without paction; for where an obligation in writing does not appear, the deſign and intent of the Statute was, that after three years all ſuch enquiries ſhould be ſuperſeded in conſequence of any proof by witneſſes, becauſe that, whether there be paction or no paction, it is natural to preſume, that neceſſary aliment will be yearly paid by perſons, eſpecially as in this caſe, who have ſufficiency of effects. And that which might amount to no more than a *præſumptio hominis*, within the three years, is after that time by the Statute a *præſumptio juris et de jure*; neither can it be argued, that a party where there is no paction, ſhould be in a better caſe than where a direct paction is proved. And this will ſerve as an anſwer to the argument, that the alimenting of a perſon under age, having tutors or curators, affords the *actio negotiorum geſtorum* competent to ſuch only as manage the affairs of others who are abſent; for a tutor *ſiſtat perſonam pupilli*, and is appointed for this very thing, to manage the pupil's affairs, and to anſwer ſuch demands as can be directed againſt the pupil; ſo that a merchant, furniſher of cloths to one under age, without any previous mandate or paction with the tutor, at a

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remote diſtance, may, with more reaſon, pretend to be a *negotiorum geſtor*, and conſequently be intitled to a perpetual action than the purſuer's cedent. And it is of no avail to ſay, that the Statute comprehends only ſuch debts as are uſually paid without any diſcharge; for what is more ordinary than to take diſcharges of houſe-mails and of merchants accompts? But if theſe are not purſued till after three years, can it be argued that they do not preſcribe *quoad modum probandi*, becauſe the party was in uſe to take diſcharges, but that no diſcharge appears thereof? And if the caſe were ſuppoſed, that a minor had poſſeſſed a houſe, or had got furniſhings out of a merchant's ſhop, can it be argued, that theſe are not comprehended under the act, becauſe the tutor can produce no diſcharges? This, to be ſure, will never conclude; for, although this may be one reaſon for enacting the law, that ſuch debts are uſually paid in a ſhort time, yet it is not the only one on which the Statute is founded; it preſumes likewiſe, that the goods were never furniſhed, or the houſe poſſeſſed; and therefore the law denies a proof by witneſſes of the poſſeſſion or furniſhing. And theſe preſumptions are ſtrongly fortified in the preſent caſe, ſince, for the courſe of 9 years that the infant lived, and for more than three years thereafter, there was never any demand whatſoever on account of the aliment.

Duplied for the purſuer: If the Statute were to extend to all debts contracted without writing, it would make a very extenſive preſcription. Rents of land would fall under it; though it is certain that, till the Statute 1669, they fell only under the long preſcription, though by the defender's argument they have a reſemblance to houſe mails. But they are not comprehended under the Statute, becauſe they are not ſo regularly paid; they are not always paid in money and receipts, and diſcharges uſe to be taken upon payment. And upon the ſame principles it is, that though goods ſold by retail, that enter into a merchant's accompt, do fall under this preſcription; yet a bargain for merchandice of any ſort ſold by wholeſale, does not; or ſuppoſe a gentleman's farms to be ſold without any written obligation; ſuch bargains are not accompts, and will not fall under this preſcription; ſo that the defender argues unjuſtly, when he pleads, that all actions, not founded on writ, fall under the Statute. And as to the ſuggeſtion, that a merchant, furniſhing cloaths and other neceſſaries to a minor, would be ſubject to the triennial preſcription; it was *anſwered*, That if ſuch furniſhings were made on account of the minor's parent, or any other liable to aliment him, no doubt the furniſhings would be conſidered as made to the parent, to a major, and would be governed by the ordinary rules: But if theſe were made upon the minor's own credit, who had tutors and curators, its doubted if ſuch would fall under the preſcription. 2*dly*, The inſtance is noways ſimilar to this caſe; it might be comprehended under the words of the act, *Merchants accompts*: but the preſent aliment was not furniſhed by a merchant, nor by retail; but was *unum negotium*, the education of the infant. And as to the ſuggeſtion, that the act was founded on other preſumptions than that of payment, it was obſerved, that payment is preſumed after three years, and therefore no action is competent, unleſs the preſumption is redargued by a proof of reſting owing, which being brought, there is no pleading this preſcription,

tion, but a proof of the furniſhing, or of the poſſeſſion: Or ſuppoſe they are admitted, and ſuppoſe further it be admitted, that no donation was intended, yet this will not avail after three years.

The quotations for the purſuer were, *February* 16. 1681, *Spence. Sande Deciſ. Frieſ. lib.* 5. *tit.* 6. *defin.* 1. *July* 23. 1678, *Thomſon.* And for the defender, *June* 23. 1715, *Forret.*

The Lords found, That the aliment of the minor fell under the triennial preſcription; and that the bond by the curator being granted after the curatory expired, does not prove that the aliment was reſting.

N° CXXXVI. *December* 12. 1739.

Andrew Williamſon contra *Iſabel*, &c. *Fraſers.*

Words of a ſubmiſſion how conſtructed.

SOME merchants in St *Andrews*, having freighted a ſhip to *France*, a ſubmiſſion was entered into, ſeveral years thereafter, betwixt the *Fraſers*, as having right to the freight on the one part, and by the ſurviving partners, and by *Andrew Turpie*, as repreſenting *Andrew Smith* deceaſed, and by *Andrew Williamſon* a minor, with conſent of his curators, as repreſenting *James Williamſons* elder and younger deceaſed, likewiſe partners, on the other hand. Upon this ſubmiſſion, a decreet-arbitral followed, in which *Andrew Williamſon* is decerned, not only for the ſhares of the two *Williamſons*, whom he really repreſented, but likewiſe he was found liable conjunctly with one *William Duncan*, as repreſenting the ſaid *Andrew Smith* for his ſhare, notwithſtanding that *Andrew Turpie* above mentioned was a party-ſubmitter, as repreſenting the ſaid *Andrew Smith*.

Of this decreet-arbitral, *Andrew Williamſon* brought a reduction on the head of minority and leſion, upon the following grounds: 1*mo*, That it was competent to him, being a minor at the time of the compromiſſion, to reduce the ſame, if it appeared, that, in conſequence thereof, he was leaſed, as is plain from many authorities of the common law, and which, it is believed, is not taken away by the general words of the ſtatute 1695. 2*dly*, By the tenor of the ſubmiſſion, the ſeveral partners, and the repreſentatives of ſuch as were dead, ſubmit, *as we or our predeceſſors being concerned, and partners in a voyage of the ſhip called the James of St Andrews*, whereby it appeared, no power was given to the arbiters to tie any of the ſubmitters, unleſs, that either he was concerned in the voyage himſelf, or was repreſentative of a perſon ſo concerned. But it was impoſſible that *Andrew Williamſon* could be tied by theſe words, to leave it to the diſcretion of the arbiters to make him repreſent whom they pleaſed; for it cannot be maintained they could decern againſt him for the whole freight, becauſe he repreſented all the partners, which they might have done by the ſame parity of reaſon, that they make him repreſent one of the partners, whoſe true repreſentative is a party ſubmitter, and deſigns himſelf the repreſentative of *Andrew Smith*, for whoſe ſhare the purſuer is decerned. And in-

deed, if he were to be tied down by a decreet-arbitral of this nature, on a ſubmiſſion in the terms above mentioned, there can be no greater inſtance of levity and raſhneſs, than going into it is; ſo that, whatever may be the rule in the general caſe, yet a minor, who enters unto a ſubmiſſion, whereby he may be made liable for debts which otherwiſe he could never be made liable for, ought to be relieved. And therefore, the words, *as we or our predeceſſors*, muſt either be underſtood to ſignify the perſons who really were their predeceſſors, and ſo the ſentence is *ultra vires*; or if it be *contended*, That theſe words muſt be taken in a larger ſenſe, and that thereby the arbiters had power to determine who were their predeceſſors, ſuch ſubmiſſion was ſo extravagant, that there can be no difficulty to impute the going into it, to the raſhneſs of a minor. 3*dly*, The arbiters having expreſſed a matter of fact, as the *ratio decidendi* againſt him, that being falſe, their decreet fell to be reduced.

Anſwered, There could be no doubt but a minor, with conſent of his curators, may effectually enter into a ſubmiſſion concerning any controverſy, the ſame being a rational deed, in order to ſhun the expence of law-proceſſes, otherwiſe minors would be in a worſe caſe than majors, as being under an abſolute neceſſity of ſpending their ſubſtance in law-ſuits, in place of having matters amicably determined by arbiters; and therefore, there can be no leſion in entering into a ſubmiſſion concerning an inveigled affair, ſuch as this claim for the freight was, it having been the ſubject of ſeveral law-proceſſes for a conſiderable time; and as the ſubmiſſion is binding, ſo, by our law, a decreet-arbitral cannot be reduced on the pretence of iniquity. As to the alledgeance, that the purſuer does not repreſent *Andrew Smith*, tho' he is expreſsly found by the arbiters, in conjunction with another, to repreſent him, it muſt appear exceeding improbable. The decreet does not indeed bear the *ratio* of ſo deciding, neither is it uſual in decreets-arbitral to expreſs the *ratio decidendi*, or the evidences that were brought before the arbiters of any fact. It is preſumable, that it was either acknowledged or documented to them in what manner *Duncan* and the purſuer repreſented *Smith*, with relation to the matter ſubmitted: But be that as it will, by our law, it is a *præſumptio juris et de jure*, that the decreet is right, and it is not quarrelable upon the head of iniquity, or any other pretence, except falſehood, corruption, or bribery. As to the argument, That falſehood may here be alledged, becauſe it is a falſe fact, or a finding that which was not true, it was a playing on words; for it is plain, that falſehood, in the act 1695, means only, that the ſubmiſſion or decreet are falſe or forged, but does not concern the finding or decerning that which is not true; for that properly is iniquity, which is no relevant objection againſt a decreet-arbitral. As to the other pretence, That the arbiters exceeded their powers in finding the purſuer repreſented *Smith*; that muſt appear very frivolous, ſeeing it is admitted, the partners and the repreſentatives of ſuch as were dead, ſubmitted what they ſhould be liable for, in ſo far as they or their predeceſſors were concerned as partners in the ſaid voyage, which behoved plainly to imply a power in the arbiters to determine how far they repreſented ſuch as were dead, ſo as to be liable for their ſhares, otherwiſe the ſubmiſſion and decreet-arbitral would have been to no purpoſe; for the ſubmiſſion

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is expreſsly with power to determine all debates and controverſies between the parties-ſubmitters, and what they ſhould pay or implement to others.

The Lords repelled the reaſons of reduction.

N° CXXXVII. *December* 12. 1739.

James Goodlet of *Abbotſhaugh* contra *John Lennox* of *Woodhead.*

A letter not holograph, whether binding or not?

Andrew Lees of *Deanfield*, having occaſion to buy a quantity of bear, applied to his brother-in law, *John Lennox* of *Woodhead*, for a letter of credit to *James Goodlet* of *Abbotſhaugh*, who accordingly wrote one, addreſſed to *Abbotſhaugh*, in the following terms:

" My friend Mr *Lees* tells me he is wanting to buy about 100 bolls " of bear; and as he is a ſtranger to you, it is what I aſſure you, that " you may deal with him ſafely; and what you and he agrees on, I " ſhall ſee you paid, if it were for 500 bolls."

In conſequence of this letter, *Abbotſhaugh* delivered to *Deanfield* 100 bolls bear. And *Abbotſhaugh* having died ſometime after the bargain was entered into, his executor brought a proceſs againſt *Deanfield* and *Woodhead*, for payment of 100 bolls bear. The defence offered for *Woodhead* was, That the letter of credit founded on, was not probative, nor binding on him, becauſe it was not holograph. *Anſwered*, That in writs of great importance, ſuch as bonds, teſtaments, *&c.* the law hath required ſubſcriptions of witneſſes, and other ſolemnities, where they are not holograph; becauſe a door might otherwiſe be opened to manifeſt frauds: Whereas, in matters of common life, which are moſt favourable, theſe ſolemnities are not neceſſary, but it is ſufficient, if the conſent of the parties contracting is any how declared. There can be no doubt, that if *Woodhead* had been preſent, and deſired *Abbotſhaugh* to ſell 100 bolls bear to *Deanfield*, upon his engaging to ſee him paid, he muſt have been liable to pay the price; and in the preſent caſe, his conſent is as plainly declared, as if he had been preſent. Beſides, it is evident from the words of the letter, that *Woodhead* knew very well, that unleſs he had engaged his credit, *Abbotſhaugh* never would have truſted *Deanfield*. See the deciſions, *Feb.* 28. 1671, Earl of *Northesk*. *Feb.* 23. 1738, *Ewing*.

In the *next* place, the preſent caſe falls under the definition of a *res mercatoria*; for it is not the name of merchant, but the nature of the contract that points it out to be ſo: A gentleman diſpoſing of his farm-bear, is in the eye of law as much accounted a merchant in that particular, as another who trades daily for his livelihood. And the reaſon why ſuch letters are probative in *re mercatoria*, is founded not only upon the favour of commerce, but likewiſe becauſe it would be detrimental

to

to ſociety, if, in the common dealings of life, too many ſolemnities were required.

Replied, The conſent of parties contracting muſt be declared in ſuch a manner as that it can be proved according to the rules of law; and a cautionry-obligation for no leſs than a 1000 merks, ſuch as this is pretended to be, is certainly a matter of conſiderable importance; and therefore ought to be ſo executed, as to be probative in law for any ſum exceeding 100 pounds *Scots*, that being always deemed a matter of importance. As to the argument, that if *Woodhead* had verbally deſired *Abbotſhaugh* to furniſh the bear, he would have been liable, it was obſerved, that the ſame could only be probable by *Woodhead*'s oath; and the queſtion here is, Whether this letter, not being holograph, is probative againſt him as to the contents thereof? And it being ſo eaſy to impoſe on perſons, by geting their names to a letter, without reading it, that the law has juſtly required certain ſolemnities to writs inferring obligations of importance, without which they are not regarded; thus a contract of ſale would not be regarded, tho' ſigned by the parties, unleſs the ſolemnity required by law were obſerved; and tho' one may bind himſelf by a miſſive which requires no ſolemnities, yet it muſt at leaſt be holograph, otherwiſe it is not regarded. See *Dec.* 22. 1710, *Gordon*. And it is a miſtake to ſay, that this letter ſhould be conſidered as in *re mercatoria*, becauſe it relates to the ſale of a parcel of bear; for the only reaſon why ſometimes letters amongſt merchants are regarded, tho' not holograph, is, becauſe of the cuſtom among merchants, who, as they are very exact in their correſpondence, ſo they keep regular books, in which are entered all their tranſactions, and copies of all their letters, whereby, if any queſtion ſhould ariſe as to the contents of their letters, their books are of great authority in ſupporting them; and it is only upon that account that the greater faith is ſhown to ſuch letters among merchants; but it would be of dangerous conſequence to ſuſtain in general ſuch letters as probative, when they are not holograph.

The Lords found the letter obligatory.

N° CXXXVIII. *January* 11. 1740.

John Hodge contra *James Fraſer*.

The courteſy does not take place in lands acquired by the wife by ſingular titles.

THE queſtion betwixt theſe parties was, whether a huſband had right to the courteſy of lands, which were acquired by his wife by ſingular titles, and in which ſhe died infeft.

For *John Hodge* the huſband, it was *argued*, That the right of courteſy was introduced by the common law, founded upon ancient and immemorial cuſtom; ſo that, in order to find in what caſes it takes place, recourſe muſt be had to our old law-books, and the opinion of ſuch writers as treat of this ſubject. In the book of *Majeſty*, this right is treated of; but no diſtinction is there made betwixt lands to which the wife

wife ſucceeded as heir to any of her predeceſſors, and ſuch as ſhe had right to by ſingular titles; but it is there laid down in general terms, "When ane man receives with his wife lands, in name of mar-" riage, and begets upon her ane heir, ſon or daughter, heard cryand, " within four walls of the houſe, and the wife happen to deceaſe, the " lands and heritage which pertained to the wife, ſhall remain and be " poſſeſſed by the huſband, induring his lifetime," *2d B. of Majeſty, chap.* 28. It was a common thing of old, for the wife's father, or other friends, to give with her a part of their lands and eſtate, in name of tocher, as appears from the 18th chap. of the ſame book; and if in ſuch caſes the courteſy took place, where the wife's right was no more than a diſpoſition from her father, *&c.* it follows, that the wife's being an heretrix, is not eſſential, provided ſhe dies infeft in the lands.

In like manner, in the burrow-law, chap. 44. "Giff ane man receives " with a woman, in name of tocher, ane burgage, and with her begets " ſon or daughter; and it happens the wife to deceaſe, *&c.* the man " or huſband ſhall bruick and poſſeſs that burgage, during all the days " of his life." There is not the ſmalleſt inſinuation here, as if the right to this burgage behoved to be by ſucceſſion to ſome one or other of her predeceſſors, in order to intitle her huſband to the courteſy. What is obſerved by all our writers, touching the affinity betwixt the courteſy and the terce, which likewiſe took its riſe from ancient cuſtom, ſerves further to illuſtrate and ſtrengthen this argument. Of old, the wife's terce was a third of the heritage in which the huſband was veſt and ſeaſed the time of the marriage; but now the terce due to the wife, is a third of the heritage in which he died infeft, tenements within burgh excepted; and it makes no difference as to the terce whether the huſband's infeftment proceeded on ſingular titles, or in the right of ſucceſſion, provided, as *Craig* ſays, *In feudo eorum diem obiat ſupremum*; and the ſame authors ſays, that the courteſy only differs from the terce with regard to the quantity. But *in reliquis eadem lege et paritate terminatur.* In the ſame manner as a relict claiming her terce is only bound to inſtruct that ſhe was lawful wife to the defunct, and that her huſband died in the fee of the lands, without condeſcending in what manner the fee was conſtitute in the huſband; ſo the huſband claiming the courteſy, is not bound to inſtruct any thing further, than that a living child was procreate of the marriage; and that his wife *tempore mortis obiit veſtita* in the lands of which he claims the liferent; and if the courteſy is likewiſe conſidered as taking its riſe from the reſcript of the Emperor *Conſtantine, lib.* 6. *tit.* 60. *cod. De bonis maternis*, which is the opinion of moſt of our writers, there can remain little doubt. See *Wood's inſt. book* 2. *chap.* 1. § 4. And a deciſion obſerved by *Hadington*, where it is ſaid, he who marries a woman who had heritage or annualrent heritable, and procreates a living bairn upon her, will get the curiality, as well of her annualrents, as of her lands.

The defence offered for *James Fraſer* was, That ſeeing the wife acquired the feu herſelf, and did not ſucceed thereto as heir to any of her predeceſſors, the purſuer could have no claim to the courteſy out thereof, as was evidently the opinion of all our lawyers. See *Skeen verbo Curilitas*, § 2. *Craig. lib.* 2. *Dieg.* 22. § 42. Sir *George M'Kenzie, lib.* 1. § 6. *Stair, lib.* 2. *tit.* 6. *P.* 281, 2d *June* 1709, *Lawſon.* This being the caſe, it was needleſs to enquire unto the law of *England* upon

this head, ſeeing they have their own law in that reſpect, which it was no wonder ſhould differ from ours in ſome circumſtances, even tho' ours was derived from it, of which, however, no veſtige appears; for inſtruments of ſeiſin, were introduced into our law and cuſtom by King *James* I.; and yet our infeftments differ vaſtly from their feofments. And it is in vain in ſuch caſes to argue on the rationality of the thing, namely, that the courteſy ought to take place, without diſtinguiſhing how the feu came. For it is a law introduced by our particular cuſtoms, and therefore termed the *Courteſy of Scotland*, and whatever the learned *Craig* may labour with reſpect to the reaſon thereof, namely, that it had its riſe from the civil law, whereby the liferent of the child's eſtate belongs to his father, the reaſon does not apply almoſt in any ſhape; for that the birth of a living child, tho' it inſtantly die, founds the courteſy, when it is impoſſible to pretend, that any thing belonged to it; ſo that it may juſtly be ſaid of this, as of many ancient cuſtoms, that *non omnibus quae a majoribus*, &c.

The Lords found, That the courteſy only takes place in lands and heritages to which the wife ſucceeds as heireſs, but not in thoſe purchaſed by her, altho' ſhe dies infeft therein.

No CXXXIX. *January* 15. 1740.

Elizabeth Mirrie contra *Hamilton* of *Murdiſton*.

An adjudication upon the act 1672, *is competent, tho' there is no conſtitution obtained againſt the defender upon which a compriſing might have been led before the act.*

INglis of *Murdiſton* diſponed his eſtate of *Murdiſton*, to *Alexander Inglis alias Hamilton*, and certain heirs of tailzie ſubſtitute to him, containing reſerved powers to burden, &c. and ſoon thereafter he bequeathed ſeveral legacies to his friends, particularly, he granted a bond to *James Pollock* for 10,000 pounds *Scots*, payable after his own death, and at the ſame time, he diſponed his other eſtate, real and perſonal, to truſtees, to be applied for payment of his debts and legacies. Upon *Pollock*'s deceaſe, his relict, as executrix creditrix to him, brought a proceſs on the paſſive titles, for payment of the 10,000 pounds *Scots*, againſt *Hamilton* of *Murdiſton*, the diſponee, who had ſucceeded to the eſtate of *Murdiſton*, and who likewiſe had had ſome intromiſſions as one of the truſtees; in which it was found, that the eſtate of *Murdiſton* was affectable for payment of the 10,000 pound bond. Upon this declaratory-decreet, without inſiſting to have *Murdiſton* perſonally liable, ſhe brought an adjudication againſt him upon the ſtatute 1672.

The defence *pled* was, That as no appriſing could have paſt againſt him before the ſtatute 1672, ſo neither could the adjudication introduced by it, in place of appriſing, go againſt him, eſpecially as he was not found perſonally liable. In ſupport of this, it was obſerved, That the adjudications introduced by the ſtatute, were introduced in place of appriſings, as was plain from the expreſs terms of the act; and that

that it did not ſupercede the adjudications formerly competent, where there could be no compriſing: Particularly adjudications *ad factum praeſtandum*, in implement of an obligation to diſpone. Adjudications *contra hereditatem jacentem*, &c. for all ſuch remain as they were before the ſtatute. And that no adjudication, in terms of the ſtatute, is competent in place of thoſe ancient ones, the one introduced by that act having only come in place of compriſings; therefore, where a compriſing was not competent before the ſtatute, neither is an adjudication upon the law now competent. Further, no compriſing was competent without a previous decreet againſt the party whoſe lands were to be compriſed, decerning him to pay the debt; neither could there be any compriſing without a previous ſearch for, and poinding of the debtors moveables, if they could be found, and *in ſubſidium*, only his lands were to be ſold by the Sheriff to the higheſt bidder. And, as no appriſing could have gone againſt the defender for this legacy, for which he has not hitherto been found liable; conſequently neither can his lands be appriſed *in ſubſidium* for payment thereof. Beſides, when the plan of the ſtatute is conſidered, it will be apparent, that the regulations therein laid down, can only apply to the caſe where there is a decreet againſt a debtor for payment of a liquid ſum: For, 1*ſt*, The ſtatute ſuppoſes a proceſs to be brought at the inſtance of a creditor againſt his debtor; now where there is no debtor, but lands found affectable, it is not within the deſcription of the ſtatute. 2*do*, When one is not liable to pay, with what juſtice can he be decerned to diſpone or conſent to an adjudication of his lands equal to the debt, and a fifth part more, and to cede the poſſeſſion of his lands? This may be juſt with reſpect to a debtor who is perſonally bound to pay; but as to one whoſe lands are only affectable, why ſhould he pay a fifth part more than the ſum with which his lands are affectable? Again, where a debtor refuſes to give lands in ſatisfaction, &c. it may be juſt to allow his whole heritable eſtate to be adjudged in ſatisfaction, in terms of the ſecond alternative of the act: But where one is not perſonally liable, but a particular right is burdened, where is the juſtice that his other eſtate ſhould be adjudged in payment of that debt. 2*dly*, *Murdiſton's* heirs of line, and the truſt-eſtate itſelf, ought to be diſcuſſed before his lands of *Murdiſton* can be affected.

Anſwered, That it ſeldom happens where a debt is due, and particular lands affectable, that ſome one or other is not perſonally liable to pay; nor can the purſuer admit, that the defender is not perſonally liable *in valorem* of his intromiſſions, tho' hitherto ſhe has not obtained judgment in theſe terms: It cannot therefore be matter of ſurprize to find our lawyers, when treating of appriſings, handling the ſubject as it commonly occurred where the debtor was perſonally liable; it was upon this hypotheſis, that the law ſeems to have thought it reaſonable that the perſonal eſtate ſhould be firſt attached, and poinded, before there ſhould be acceſs againſt the lands. But if the caſe ſhall be ſuppoſed, even as the law ſtood when appriſings were to be allowed, that there was a debt to which *Murdiſton* himſelf was perſonally liable, tho' payment could not be demanded before his death; that he had tranſmitted his eſtate in ſuch form, as that the diſponee or inſtitute ſhould not be perſonally liable, tho' the lands themſelves ſhould ſtill be affectable for payment: The purſuer can make, no doubt, but even as the law then ſtood, the lands would have been compriſed for payment of this debt, tho' neither the perſon nor moveable eſtate of the diſponee could be reached.

Before

Before the ſtatute 1672, there was originally no form of proceſs known whereby the property of lands could be reached for payment of a liquid debt, but by an appriſing; and wherever the debt was liquid, appriſing was competent, only with the exception, that where the debtor was perſonally liable, his moveables behoved to be firſt ſearched for, and poinded, before the lands could be appriſed: And upon this plan it was, that where the debt was illiquid, as where it conſiſted *in obligatione ad factum praeſtandum*, it was neceſſary by a proper proceſs to liquidate that obligation. But as the law was ſtill defective, ſo far as no remedy was competent, whereby creditors might recover payment, where the debtor was dead, and that the apparent heir did refuſe to acknowledge the ſucceſſion; or where lands had been ſold, but the purchaſers right not completed, there the court did ſupply that defect by a remedy, till then unknown, whereby, in the one caſe, they adjudged the *hereditas jacens* upon the heir's renunciation, and in the other did adjudge the particular lands in implement of the diſpoſition. But wherever the claim was liquid, or ſuch as might be rendered ſo, the only remedy was an appriſing; and ſince the ſtatute by adjudication, without regard whether the proprietor is perſonally liable or not, and as it is optional to him to give a partial progreſs or not, the whole lands falls to be adjudged, where ſuch partial right is not conſented to; as it is impoſſible to think, that a caſe ſhould occur where particular lands are affectable for payment of a particular debt; and that no form of proceſs ſhould be competent, whereby to make that payment effectual againſt the lands, and the purſuer knows of no other method but this adjudication. As to the 2d *objection*, it was *anſwered*, That however this defence may be competent againſt the effect of the adjudication, when payment comes to be demanded, it is not competent at preſent to ſtay decreet of adjudication, as the eſtate itſelf is here the debtor; beſides, there is no perſon who can repreſent *Murdiſton qua* heir of line, the whole eſtate having been conveyed, partly to the defender *quoad* the lands of *Murdiſton*, and the remainder by the truſt-diſpoſition.

The Lords found, That adjudication upon the act 1672, *is not competent in this caſe, there being no conſtitution againſt the defender, upon which a compriſing might have been led before the act.* But upon a reclaiming petition and anſwers, *The Lords found that adjudication upon the act* 1672, *was competent in this caſe.*

N° CXL. *January* 16. 1740.

John Mackean contra *Elſpeth Ruſſell.*

Law of deathbed.

James Mackean being creditor to Sir *Hary Innes* in a bond for 2000 merks, payable to himſelf if in life, and after his deceaſe, to certain other perſons, containing a power to *James*, at any time in his life, to uplift, receive, and diſcharge the ſame, without conſent of the perſons whoſe

whoſe names were therein mentioned, did, on deathbed, exerce this faculty, and gave it away, not only from the heirs at law, but likewiſe from the ſubſtitutes.

In a reduction on the head of deathbed, it was *pled* for the heir at law, That the deathbed-deed did evacuate the ſubſtitution, whereby there came to be place for him; and tho' with the ſame breath the ſubject is given away to ſtrangers, the alienation could not be effectual againſt him, being done on deathbed.

The Lords repelled the reaſon of reduction.

N° CXLI. *January* 22. 1740.

James Tarras contra *Innes* of *Dunkinty*.

From what period a bill payable three days after ſight, on which no demand was made for many years, ſhould bear annualrent.

GEeorge *Brown* being creditor to *Innes* of *Dunkinty* by a bill for 120 pounds *Scots*, dated in the 1715, indorſed the ſame to *Robert Sanders*, and, after both their deaths, *James Terras*, as executor-creditor to *Sanders*, brought a proceſs againſt *Dunkinty* for payment; and the only queſtion betwixt them was, from what period the bill bore annualrent, it being payable *upon three days ſight thereof*, and bearing to be for caſh delivered to *Dunkinty*.

Pled for the defender, That, at this diſtance of time, he could not recollect upon what occaſion the bill had been granted; but as both the drawer and he lived in the ſame town together for 11 or 12 years thereafter, and no demand thereon, tho', from the face thereof, it does not ſeem to have been intended to lye over as a ſecurity, there is the greateſt reaſon to believe it has been paid. But whatever may be in that, he is intitled to plead, that as no proteſt was taken thereon, it muſt loſe all the privileges that would otherwiſe have been competent to it. A bill, by its own nature, and according to the conception of it, is not a ſecurity carrying intereſt by conſent of parties; ſomething muſt be done upon the part of the creditor to interpel the debtor before that intereſt can ariſe; and the leaſt thing that can be imagined is, that there be a demand. And, as by the ſtatute 1681, a proteſt is neceſſary in order to obtain diligence, ſo it ſeems alſo to be implied, that the ſame thing ſhall be required to give a title to intereſt; and as a proteſt is neceſſary in caſe of non-acceptance, ſo there is the like reaſon, that this ſhould obtain in the caſe of not payment, it being equally juſt that there ſhould be a demand for payment, as well as for acceptance, before a party be conſidered as *in mora*; which is alſo eſtabliſhed by the law of our neighbouring nation, act 9. and 10. *Will.* III. *c.* 17. § 2. In the common courſe of dealings betwixt man and man, no debtor will be thought to be *in mora* that pays his debt as ſoon as it is demanded: And it would be a pretty extraordinary extenſion that the purſuer pleads for, to have the bill ſo conſtructed, as if it had bore ſo many days after date, when, by

the tenor of it, it bears to be upon ſo many days ſight, theſe things are different in their nature, and muſt be different in their effects; and there is no more reaſon to preſume that the acceptance is of the date of the draught, than that it is of any other date betwixt that time and this; and as the draught is upon ſo many days ſight, it can infer only, from the nature of the thing, that the accepter ſhall pay within ſo many days after payment is demanded.

Pled for the purſuer, That as the bill bears for caſh delivered, there ariſes a moral certainty anent what was intended for the day of payment. 2*dly*, Tho' there appears to have been an inaccuracy in the writer of the bill, who, inſtead of inſerting the word *date*, has made it *ſight*; yet, the intention muſt have been certain, even as to the day of payment; becauſe it is impoſſible that the money as expreſſed in the bill, could have been inſtantly delivered in caſh perſonally to the defender, unleſs at the date of the bill *Dunkinty* had been preſent; and conſequently three days from the date, that is, three days from or after the receipt of the money, the ſum in the bill became due, and muſt bear annualrent; which is ſtrongly fortified from this circumſtance, that both drawer and accepter lived in the ſame town of *Elgin*, where *Dunkinty* received the money, and where the bill is dated; which therefore is ſufficient to inſtruct the acceptance to have been of the date of the bill. Nor can it afford any objection, that the bill was not proteſted, as in the caſe of a bill drawn on a third party, and ſent to a factor to have it preſented for acceptance, or otherwiſe negotiated, ſeeing that rule cannot apply here, where the drawer and accepter were perſons living in the ſame town, both preſent, the bill itſelf bearing that they were ſo, in as far as it expreſſes the value to have been caſh inſtantly delivered, and as ſuch, accepted at the ſame time; that it likewiſe declares the bill to be payable upon three days ſight; that therefore muſt ſignify three days after the acceptance and date.

The Lords found intereſt due on the bill three days after ſight, which, in this caſe, they conſtructed to be three days after the date of the bill.

N° CXLII. *January* 29. 1740.

Cornelius Neilſon Charger, contra *Alexander Bruce* Suſpender.

The objection to a bill that it was granted for a game-debt, is not good againſt an onerous indorſee who was ignorant of the cauſe.

THE queſtion betwixt theſe parties was, Whether the objection to a bill that it was granted, or came in place of another which was granted for a game-debt, was good againſt an onerous indorſee.

For the indorſee it was *pleaded*, That ſecurities do not carry their cauſes in their face; and a fair trader, where there are no ſuſpicious circumſtances of the debtor, ſuppoſes the cauſes to be juſt, otherwiſe commerce would be at an end; for what man would receive indorſations to bills,

bills, if the objection of being won at play, was to ſtop his payment? This would render all bills ſuſpicious, eſpecially with ſuch cautious people as merchants, who would not fail to argue, that tho' the debtor ſeems to be a very good man, yet he may love play in private, and this may be a game-debt. And if this had been the intention of the act to give ſo notable a blow to commerce, ſurely it would have been expreſſed, that bills, tho' paſſing unto the hands of perſons not privy to the wrong, ſhould not be exempted from the ſtatutory nullity; an exception that is included in the very nature of the thing, muſt be carried along in the intendment of the act of parliament. And this is the genius of the law of *England*, by which this ſtatute muſt be in a great meaſure explained. The act of the 9th *Anne*, was not new as to the annulling of bills and other ſecurities granted for game-debts; the ſame thing was before ſtatuted by the act 16. *Cha.* II. *chap.* 7. whereby all ſuch ſecurities are declared to be utterly void, and of no effect; and yet it never was imagined by the judges in that country, that this was to hurt innocent parties noways partakers of the fraud, and ſo it was adjudged. See *Neilſon's Abridgment*, *P.* 893. and *Salkild*, under the word *gaming*, *Huſſie* againſt *Jacob*; which precedents, as they are founded on good ſenſe, muſt be law every where.

Anſwered for the debtor in the bill, That by the words of the act, "All notes, bills, *&c.* where the whole, or any part of the conſidera-"tion of ſuch conveyances or ſecurities ſhall be for any money, *&c.* "won by playing at cards, dice, *&c.* ſhall be utterly void, fruſtrate, "and of none effect, to all intents and purpoſes whatſoever, any ſta-"tute, law, or uſage to the contrary thereof, in any ways notwith-"ſtanding." The generality of which words utterly excludes any limitation or reſtriction to be put upon them; the prohibition extends not only to the ſecurities themſelves, amongſt which bills are ſpecially mentioned, but alſo to the conveyances of ſuch ſecurities. And it is anxiouſly provided, that they ſhall be utterly void, *&c.* to all intents whatſomever, with a *non obſtante* to any ſtatute, law, or uſage to the contrary. The act proceeds upon the recital, that the former laws were, by experience, found inſufficient to reſtrain the miſchief intended to be cured; and therefore goes on not only to provide new remedies, but alſo to enforce thoſe which had been formerly enacted by a more particular accuracy of expreſſion. It is therefore in vain to plead the oneroſity of the indorſation, if the ſecurity itſelf is originally for a play-debt, the law has made it void, and of none effect; all conveyances of it are in the ſame manner condemned; and if the indorſation of it to a ſtranger ſhall make it revive, the words of the law muſt be uſeleſs, and without a meaning: And if this is ſo, arguments from inconvenience, whether real or imaginary, can have little effect; they cannot be ſuppoſed to have eſcaped the wiſdom of the legiſlator, and the law enacted, muſt be looked upon to be the reſult of mature deliberation, after balancing the inconveniencies on both ſides. The miſchiefs ariſing from gaming are obvious, and it could not but occur, that contrivances would be attempted to diſappoint the law; theſe negotiations are generally carried on in a hidden way; and where ſecurities are to be given, it was natural to imagine, that the names of third parties might be made uſe of to cover the deceit It is indeed poſſible that minors and onerous creditors may ſometimes be unwarily impoſed upon to accept ſuch ſecurities,

not

not ſuſpecting that they were originally the product of game; but this hazard was not thought of weight enough to be laid in the balance with the imminent danger which muſt ariſe from falſe and fictitious covers which might be made uſe of in play-debts. It is a maxim in law, That every one ought to know the condition of the perſon with whom he contracts; which muſt apply in the preſent caſe, at leaſt, with equal force, where the exception againſt the original debt is eſtabliſhed by a ſtatute, which occurs in other inſtances where the oneroſity on the part of the creditor would not be available, ſuppoſing the bill laboured under the exception of falſehood or force; and yet theſe would as little appear from the face of the bill as this; nor can the reaſon be other than this, that the bill being null *ab initio*, is thereby incapable of conveyance. See the law 2. § 1. *et l.* 4. § 2. *De Aleatoribus.* And as to the precedents quoted for the indorſee, they are prior to the ſtatute in queſtion, and ſo cannot be obtruded to limit or reſtrain it; they are laid upon the act of *Cha.* II. by which the proviſion is not ſo full and ample as in the preſent. Beſides, they are inſtances which prove the artifices contrived to defeat the law, which makes it reaſonable to preſume they have given occaſion to the enlargements made by the poſterior act.

The Lords repelled the reaſon of ſuſpenſion founded on the game-act, in reſpect the bill in queſtion was purchaſed by the charger for onerous cauſes; and that there is no evidence offered of his being in the knowledge that the bill was granted for a game-debt.

N° CXLIII. *February* 1. 1740.

Sir *Robert Stewart* contra the Feuars of *Tillicoultrie.*

There lies no action upon the act 1695, *for dividing a commonty where the right of property is in one, and only a right of common paſturage in others.*

SIR *Robert*, as proprietor of the hills of *Tillicoultrie*, brought an action upon the above act, againſt the feuars, who ſtood infeft in their reſpective lands with a right of paſturage on theſe hills.

For the purſuer it was *urged*, That the act 1695, was a very uſeful and valuable law, tending greatly to advance the public intereſt; therefore, it ought rather to be extended than reſtricted; conſequently, if there were any dubiety anent the meaning thereof, the words ſhould be conſtructed in as large a ſenſe as they could poſſibly admit of. In the *firſt* place, it can admit of no doubt, that in the general and common way of ſpeaking in this country, by commonties, are meant any large pieces of ground that have been poſſeſſed promiſcuouſly, by the neighbours about, in common paſturge, without any diſtinction as to the nature of their rights, whether the adjacent heritors have a joint intereſt, as of common property, and the reſt the ſervitude of common paſturage; and words uſed in laws are to be taken in the ſenſe that they are commonly uſed throughout the kingdom, otherwiſe no law would be

be intelligible, but the legiſlator behooved to define every term that is uſed in law. See *Craig, lib.* 2. *Dieg.* 8. § 33. *Stair, b.* 2. *tit.* 7. § 14. And indeed, if the matter is ſeriouſly conſidered, it muſt be obvious, that this act was chiefly intended to authoriſe the diviſion of ſuch commonties as this: For, 1*ſt*, The reaſon of the law for preventing the diſcords that ariſe about commonties, applies to the caſe of this, as well as others; nay, there are many more where the rights are of the nature of the one in queſtion, than of thoſe conſiſting of a joint property: Hence it ought to be preſumed, that this general law was calculate, ſo as to comprehend the caſe of the commonties that were moſt frequent in *Scotland*; otherwiſe it could never anſwer the end of the public utility, which was intended by it. Beſides, if it was only intended for a diviſion of ſuch commonties as belonged to heritors in common property, it was an uſeleſs and unneceſſary act, becauſe, without it, common properties might have been divided upon the footing of the common law, *actione communi dividendo*; but, as by the principles of the civil law, there lay no action for dividing a common muir, whereof the property belonged to one, and the reſt had only rights of ſervitude, things that were quite different, and as that was the caſe of moſt of the commonties of *Scotland*, it was therefore neceſſary to make a ſpecial law, to authoriſe the diviſion thereof, in order to promote the policy and general utility of the nation. And that this Statute was intended for the diviſion of commonties, where one has the property and the reſt only ſervitudes, appears from the words *impowering the Lords of Seſſion to determine upon the rights and intereſts*, &c. and from the exceptions, namely, commonties belonging to the king in property, and thoſe belonging to royal burghs, conform to which it was determined, 7th *January* 1724. *Hog* of *Harcarſe*.

Anſwered for the feuars, That before this act, there could be no diviſion where there was only a common paſturage, though, as Lord *Stair* obſerves, *tit.* Real Servitudes, § 14. it was otherwiſe in the community of the full property; and therefore the act of Parliament could never be intended to alter the laws of the land, eſtabliſhed and approven of by cuſtom, and the opinion of lawyers, but only to eſtabliſh and make more certain what was law before, with reſpect to the diviſion of common properties, and to ſettle a rule for ſuch diviſion. Nor is it a new thing for our acts of Parliament to provide for caſes, which were held to be law even before the act; though in this Statute ſomething more is done, certain exceptions are introduced, which were no exceptions by the law before, or with reſpect to which, at leaſt, there was ſome doubt; and alſo it lays down a certain rule for making ſuch diviſions. But the extenſion now pleaded for by the purſuer is diſagreeable both to juſtice and equity; for where a grant is made of a ſervitude of paſturage only, where is the equity, that the perſon to whom it is given in place of the thing granted, be allowed to claim a ſhare of the property which the granter kept to himſelf? or where the juſtice, that where one has granted a right of paſturage, which really and in effect exhauſted the uſe of the land upon which it was conſtitute, ſhould be allowed to recal his grant, and in place of the whole, give the grantee a part only, under the colour of giving him a privilege of blindly diving into the bowels of the earth, to ſearch for what he knows not where to find, and which when found might not be profitable? It was from the prin-

ciple of common equity and juſtice that our laws did not allow of ſuch diviſions, unleſs of conſent; and this Statute cannot be ſo explained as to be introductive of ſo palpable an injuſtice, if it can receive another conſtruction: If the words are conſidered, it provides only for the diviſion of commonties, that is, common properties; and there is nothing clearer in our law-books and rights, than the diſtinction betwixt commonty and common paſturage on another's property; of courſe, if the law had been intended for dividing lands burdened with common paſturage, the penman would doubtleſs have taken care to have expreſſed it without ambiguity, and not have uſed a term, which, in propriety, at leaſt, it muſt be admitted, expreſſes only common property. Where one ſtands infeft in a commonty, his right extends to a partial property, unleſs poſſeſſion has explained it otherwiſe; but where one is infeft *cum communi paſtura*, his right is limited to a ſervitude upon another's property; and this is a demonſtration, that in the ſtile of our writings, by commonty is only meant common property; nor has any of our authors called common paſturage a right of commonty, though at ſometimes, where they are not particularly explaining the diſtinction, a common paſturage may be called a commonty in this ſenſe, becauſe many have the right of that paſturage in common. See Lord *Stair*, *tit.* Rights real, § 28. One thing is likewiſe obſervable from the act, *viz.* That the intereſt of the heritors muſt be eſtimate according to the valuation of their reſpective lands and properties; which is a juſt rule with reſpect to common properties; but if it were to be extended to caſes like the preſent, nothing could be more unequal than the rule there ſettled. As to the obſervation, That if the act did not concern caſes like this, it was an uſeleſs law, the ſame may be ſaid of all acts which are declaratory of what was law before; and with reſpect to the clauſe, "impowering the Lords of Seſſion, *&c.*" it means no more than that they are to judge how far the ſeveral pretenders have a right, to hear them upon the valuations of their lands, and to divide accordingly. With regard to the two exceptions founded on by the purſuer, they are nowiſe in point; for as to the firſt, the act does not ſay, that the whole lands were to belong to the king in property, but the exception is of commonties belonging to him in property, where he has a joint and common property with his vaſſals; and with reſpect to the other, of commonties belonging to royal boroughs, it was obſerved, that ſuch were truly properties belonging to the borough, and are called commonties, becauſe of the common intereſt that the burghers, *qua* ſuch, and as conſtituting the body-politic have in them; and leſt the inhabitants ſhould have pretended upon this act, each to appropriate to himſelf a ſhare of the common property of the borough, therefore it provides that they ſhall not be diviſible; at the ſame time, there is no doubt there are ſome inſtances where the royal boroughs have only a right of common paſturage, yet generally ſpeaking, what is called a commonty, is really a property belonging to the borough for the common benefit of the incorporation.

The Lords found Sir Robert *had no title to purſue a diviſion of the commonty of* Tillicoultrie, *upon the act of Parliament* 1695.

N° CXLIV.

N° CXLIV. *February* 2. 1740.

Duke of *Douglas* againſt *Baillie* of *Littlegill*.

The valuation of the dominant tenements is the rule in dividing commonties, though the poſſeſſion of each had been for a long time according to a certain fixed proportion or ſouming.

THE Duke, as heritor of the lands of *Meddingcoats*, brought a diviſion of the common of *Hartinhill*, againſt *Baillie* of *Littlegill*, as heritor of *Mott*, &c. And a proof having been allowed of the manner how it had been poſſeſſed, the ſum thereof amounted to this, that the ſame had been poſſeſſed *pro indiviſo*, and that for many years paſt; by an agreement among the tenants, the number of the beſtial was according to a fixed proportion or ſouming; and when it was found by experience, that the ground was overſtocked, a reduction was made; particularly in the 1719, the poſſeſſors of the dominant tenements, in order to preſerve an equality, reſorted to that kind of jury, called a birley-court, who adjuſted the number of the ſoums to which each of the dominant tenements was to be reſtricted.

Pled for the defenders, that the proportion of the intereſt of each of the dominant tenements in this commonty being fixed by long poſſeſſion, the purſuer could not be allowed to inſiſt for a diviſion, according to the valuation of the reſpective lands in the books of ſupply, as it would be moſt unjuſt that he ſhould have a larger ſhare of the commonty after the diviſion than he ever poſſeſt before; that the deſign of the act 1695, was to give every dominant tenement his ſhare in property diſtinct from the reſt, in order to prevent diſcord which communion is apt to beget; and however juſt and expedient the valuation of the dominant tenement may be as a general rule, where things are otherwiſe equal, yet this could not take place where the intereſt of the dominant tenements were differently eſtabliſhed by the conſent of parties; and that the caſe here was the ſame as where a moſs lies betwixt the lands of different heritors; which if the portion of each ſhall appear by boundaries that have been obſerved immemorialy, this will be preſumed and held equal to a contract of diviſion in writing betwixt the heritors. And the words of the act ought to be taken *civiliter et cæteris paribus*, and not *judaice*, as ſtrictly confining judges by the letter of the Statute, which upon no conſideration can be neglected.

Pled for the Duke, That the common fell to be divided according to the valued rent of the lands intereſted in the common in the terms of the act, which is a rule founded on reaſon; for the law concerns only common property, where the parties are joint proprietors of the ſubject to be divided. And as property is a right known in law, importing a right to take the full uſe and benefit of the ſubject that it is capable of; ſo one is equally proprietor of his lands, whither he conſtantly make the full uſe of it or not. For inſtance, if one has 5 acres of paſture grounds, and his neighbour the like number of acres of the ſame quality; ſuppoſe the firſt holds but 5 cattle and the other ten, the right of property to the firſt will not thereby be diminiſhed. And therefore,

where

where a large hill is common to ſeveral heritors, and it is only proper for paſture, ſuppoſe likewiſe their intereſts equal; and it happens that one of them uſes a part of his property-lands in paſture, whereby he has leſs occaſion to paſture on the common than his neighbours, this however will not deprive him of his ſhare of the common property. Hence it is, that where ſeveral heritors have an intereſt in a common, the law has preſumed that their intereſt is proportioned to their valued rent, and upon that account has directed the diviſion to be made by that proportion, without regarding extrinſick circumſtances, ſuch as the poſſeſſion of the ſeveral heritors: Nor is it any objection to this doctrine, that in a ſervitude of paſturage the poſſeſſion is the rule; for that ariſes from this conſideration, that a ſervitude cannot exceed *prædii dominantis utilitatem.*

The Lords found the diviſion muſt proceed according to the valued rent.

N° CXLV. *February* 8. 1740.

Aliſon Pringle contra *Thomas Pringle* of *Symington.*

Import of a clauſe in a marriage-contract providing a certain ſum to the children of the marriage, in ſatisfaction of all they could claim except what farther the father ſhould provide to them of his own free will.

BY contract of marriage betwixt *Robert Pringle* and *Ann Rutherford*, in the 1687, "he obliged himſelf, his heirs, executors and ſucceſſors, "to pay to the children of the marriage, in caſe of his wife's predeceaſe, "the following proviſions, *viz.* If there were two or more children, "the ſum of 12,000 merks, to be divided as he ſhould think fit, and "that at the male childrens age of 21, and the females age of 16, or "either of their marriages, which ever ſhould firſt happen, which "ſhould be in full ſatisfaction to the children, of all that they could "claim from their father, excepting what further he ſhould provide "to them of his free will." Of this marriage there were iſſue three ſons and one daughter. *Anno* 1698, he granted a diſpoſition of his lands of *Symington*, in favours of *Thomas Pringle* his eldeſt ſon, then an infant, on the narrative of love and favour, and certain other onerous cauſes, *&c. Robert*, in his own lifetime, provided his two younger ſons, and took from them diſcharges of any claim they might have upon the contract. *Ann Rutherford* predeceaſed her huſband, who died in the 1738, leaving beſide his land eſtate diſponed to his ſon *Thomas*, an executry to the extent of 17,000 merks and upwards. Upon which *Aliſon Pringle* the daughter confirmed herſelf executrix to her father, and brought an action againſt her eldeſt brother *Thomas* for certain ſums, part of the executry intromitted with by him.

The defence *pled* for him was founded on the contract, *viz.* that thereby the ſum of 12,000 merks, was provided to the children of the marriage, payable at their reſpective ages as therein ſet furth, by the defunct's

defunct's executors, and that he was creditor in a proportion of that ſum, exceeding the ſums claimed from him by his ſiſter, his father's executor, whereby her claim was excluded by compenſation.

In ſupport of this, it was obſerved in general, That it was a rule in our law, that tho' the heir and executor, with reſpect to creditors, be conſidered at *eadem perſona*; yet, in queſtions betwixt themſelves, they come under a different conſideration; and the heritable and moveable ſucceſſions, makes the defunct to be conſidered as two different perſons, and having two different heirs: Hence it is, that if the executor be creditor to the defunct in an heritable debt, his ſucceſſion as executor will not extinguiſh the debt *confuſione*, but the debt will be good againſt the heir, and will receive execution in the ſame manner, as it would do in the defunct's lifetime, and ſo of the heir, if he was creditor to the defunct in a moveable debt. *2do*, By the terms of the contract, the children were proper creditors to their father in the ſpecial proviſion of 12000 merks, of which the term of payment did actually exiſt in their father's life, ſo that they might have brought an action againſt him for payment in his own life. *3tio*, It was equally plain, that this was a moveable debt; the father bound his executors to pay the proviſions to the children, conſequently, tho' the defender had ſucceeded as heir to his father, his claim to a ſhare of the proviſion, which was founded on his mother's contract, would not thereby have been extinguiſhed *confuſione*, the ſucceſſion as heir is underſtood to be *cauſa lucrativa*, or by the will of the defunct; the heir in all queſtions with the executor, is conſidered to take the ſucceſſion, not in payment of the moveable debts due to him by the defunct, but as a donative from his predeceſſor: and conſequently not in ſatisfaction of his anterior moveable debts; All which muſt hold in the ſtrongeſt manner in the preſent caſe, where the defender does not take his father's eſtate as heir, but by diſpoſition for love and favour, reſerving the granter's liferent, and alterable at pleaſure; ſo that there is no place here for the queſtion, Whether *debitor preſumitur donare*. See *December* 1728, *Archibald Robertſon*. And if this is a general rule of law, That a moveable debt due by a defunct to his heir, is not extinguiſhed by the creditor's ſucceſſion as heir, if the defunct alſo leave an executor, it muſt apply in the ſtrongeſt manner to the preſent caſe, where, by the particular conception of the contract, it appears to have been in the view of parties that the children of the marriage might ſucceed as heirs to the father; and that their proviſion ſhould be over and above their ſucceſſion as heir, or as neareſt of kin to their father.

Anſwered, The import of the proviſion was, That the father thereby provided 12000 merks to the children of the marriage, in full of all they could claim, only if he ſhould pleaſe, of his own free will, to give them more, or if the heir ſhould ſucceed to him in heritable ſubjects of a greater extent than his ſhare, or if the younger children ſhould take more, as neareſt of kin to him, than their ſhares of the proviſion, then they ſhould reſpectively enjoy the whole they ſhould get or ſucceed to, notwithſtanding that, by the preceeding terms of the proviſion, they ſeemed to be reſtricted to the ſum of 12000 merks; and the gloſs put on it by the defender is abſurd, *ſcil.* That it was to be over and above what the children ſhould receive from their father, and over and above what they ſhould ſucceed to as heirs or neareſt of kin to him; for, at

this rate, as the heir would take the heritable eſtate, and notwithſtanding have a claim for his ſhare of the proviſion, ſo the younger children, by the ſame rule, behoved to take the whole moveable eſtate, as neareſt of kin, and ſtill be intitled to their ſhares of the proviſion. Now, where could there be a fund for payment of the proviſion, or a debtor that would be liable to the one or the others claim; for the heir, who is ſuppoſed to take the heritable eſtate, could no more affect the moveables for his ſhare of the proviſion, than they could him as heir for their ſhares; for, in this ſenſe, it is ſuppoſed, that both take their reſpective ſucceſſions over and above their proviſions. Further, if the father ſhould have given bonds of proviſion to the reſpective children, to a much greater extent than the proviſion in the contract to the children *naſcituri*; he ſhould ſtill remain debtor to his children in that proviſion, unleſs he expreſsly declared in the bonds, that the ſame ſhould be in ſatisfaction thereof; than which nothing were more abſurd. The word *further*, mentioned with reſpect to *what the father ſhould freely give*, muſt be underſtood repeated in the ſubſequent clauſe as to *what they ſhould ſucceed to as heirs or neareſt of kin to him*, and explains the meaning of the whole to be as above, That the proviſions that might be given to them by their father, after their exiſtence, or what they ſhould ſucceed to, ſhould be firſt imputed in ſatisfaction of the proviſion in the contract; and that they ſhould retain the overplus. It is true, the children are here proper creditors in their proviſions, as in the caſe of *Eaſterogie*, and might have purſued their father for the ſame, after the term of payment, or upon their diligence competed with extraneous creditors; but as he, who had power of diviſion might have made any of them repent of ſuch procedure, ſo it cannot affect the preſent caſe. The defender has ſuffered his claim to lie over till his ſucceſſion, as in common prudence he had reaſon to do, the value of the eſtate ſucceeded to being vaſtly more than his ſhare of the proviſion; and therefore he muſt reſt ſatisfied with it, as he may well do, and not pretend to rear up a claim againſt the executry. The diſpoſition to the defender contains indeed ample powers to revock and burden, and conſequently could not at its date be underſtood in ſatisfaction of any debt; but then, it having remained unrevocked, it muſt extinguiſh the defender's proviſion, and muſt be underſtood in the ſame manner as if he had ſucceeded as heir, which is the moſt favourable light it can be taken in for him, he being truly heir *præceptione*. The caſe ſo ſtanding, the principle laid down for the defender, That an heir being creditor to a defunct in a moveable bond, has action againſt the executor for the ſame, notwithſtanding of his ſucceeding to the land eſtate, tho' well founded in law, does not apply to this caſe; becauſe, tho' the defender was creditor in a ſhare of the proviſion to the children *naſcituri*; yet it was in ſuch manner, that what he might ſucceed to as heir, ſhould ſatisfy his claim on the proviſion in the firſt place, and that he ſhould retain what further might accreſce to him as ſuch.

The Lords found, That the ſon having ſucceeded to his father, by diſpoſition to his land-eſtate, his ſhare of the 12000 *merks is ſatisfied and extinguiſhed.*

N° CXLVI.

N° CXLVI. *February* 19. 1740.

Alexander Hay and his Curator contra *William Carſe.*

Objection to a Warning.

THE deceaſed *Alexander Hay*, portioner of *Inverеſk*, diſponed his houſe, park, garden, pidgeon-houſe, offices, and ſlent in the haugh, *&c.* lying in the town of *Inverеſk*, to *Alexander Hay* his ſon; and by a deed of the ſame date, he nominate certain perſons to be tutors to him, he being then within the years of pupillarity. After *Alexander* the father's deceaſe, the tutors, by a tack of date the 27th *January* 1735, ſet the above ſubjects to *William Carſe*, for the ſpace of three years, from and after his entry thereto, which, by the tack, was declared to begin to the garden, park and dovecote, at the date thereof, and to the manſion-houſe, office-houſes, and ſlent in the haugh, at the term of *Whitſunday* thereafter. In conſequence of the above tack, *William Carſe* entered to poſſeſſion, and after the tack was expired, *Alexander Hay* and his curator, warned *William Carſe* on the 22d of *December* 1740, to remove from the park, garden, and dovecote at *Candlemas* then next, and from the manſion-houſe, offices, and ſlent in the haugh, at the term of *Whitſunday* next to come.

Amongſt other objections, it was *pled*, That, by the act 1555, no tenant is obliged to remove from his poſſeſſion, except he be warned forty days preceeding the term of *Whitſunday* before his removal; and therefore, as the defender was not warned in terms of the ſtatute forty days before the term of *Whitſunday* 1739, he cannot be obliged to remove at this term of *Candlemas*. In ſupport of this, it was obſerved, That there is no authority from the law or practice for executing a warning to remove forty days before any term but that of *Whitſunday*, at whatever term thereafter the conventional term of entry or removal may be; as has been often determined; ſee 15th *June* 1631, *Ramſay*, 8th *July* 1626, 16th *December* 1628.; and if the warning is void and null as to the removal from the garden, dovecote and park at *Candlemas* 1740, it muſt neceſſarily follow, that the warning forty days before *Whitſunday* (from the houſe), to remove at the enſuing *Whitſunday*, cannot be available, by reaſon the whole is ſet in one tack for one and the ſame number of years, and for payment of a joint tack-duty of L. 24 Sterling yearly; for what ſhould the defender do with the garden, if he has no houſe? Where ſhall he lodge his cattle that ſhould feed in the park, if the office-houſes which were ſet to him for that purpoſe ſhall be taken away? It could never then be the meaning of parties, by ſetting this tack, that the tackſman ſhould be removed firſt from the manſion-houſe and office-houſes: On the contrary, this is the very intent of the anticipation of the term of removal from the garden and park, that the tenant who ſhould come to the houſe might have an opportunity of ſetting theſe in order againſt the time, that he ſhould enter to the houſe. And therefore the defender cannot be lawfully warned to remove from the houſe, until he ſhall be firſt legally warned to remove from the garden, dove-

cote

cote and park; and when that ſhall be done, no doubt he muſt remove from the houſe at the *Whitſunday* thereafter; more eſpecially, that the land is the moſt conſiderable thing ſet, the eſtimate of the rent of them being L. 15 Sterling, *viz.* 12 for the park, 2 for the garden, and one for the dovecote; ſo that the houſe and ſlent in the haugh, could only be 9 pound.

Pled for the purſuers, That in the preſent circumſtantiate caſe, no argument can be founded on the ſtatute, albeit no warning was uſed 40 days preceeding *Whitſunday* 1739, in regard that the warning upon which this removing is founded, is certainly 40 days before the term of *Whitſunday* 1740, and of conſequence, ſufficiently ſupports the ſame with reſpect to the removing from the manſion-houſe, office-houſes, and ſlent in the haugh at that term: And if that is ſo, the defender muſt of conſequence remove from the park, garden and dovecote immediately; becauſe it is evident from the whole clauſes of the tack, that the houſe is what appears to be principally ſet, and the yard and park adjacent thereto but as acceſſories to, or pertinents of the ſame. Here then is a ſet, not of a *praedium ruſticum* where the houſe was for the conveniency of labouring the ground, but of a *praedium urbanicum habitandi cauſa*; and therefore, ſince the warning from the houſe is unexceptionably good, the exception to it with reſpect to the acceſſories, muſt go for nothing.

The Lords found, That this caſe fell under the act 1555, anent the warnings of tenants; and therefore ſuſtained the objection to the warning.

N° CXLVII. *February* 19. 1740.

Francis Drummond of *Harboll*, Purſuer, contra *John Stewart*, &c. Defenders.

Triennial preſcription of Accompts.

THE purſuer having advanced certain ſums of money to his niece *Jean Chalmers*, for defraying her firſt huſband's funerals, and carrying on a proceſs of reduction of her contract of marriage with him, brought a proceſs for payment thereof againſt the repreſentatives of her ſecond huſband.

The defences were, 1*mo*, Preſcription, the laſt article of the accompt being dated *anno* 1710, which it was *pled* was founded on the ſtatute introducing triennial preſcriptions in all actions of debts, or merchant-accompts, and other debts not founded on written obligations; and that this caſe fell preciſely under the words of the act, *ſuch like debts not founded on written obligations*. 2*do*, That this claim being only a debt of the wife's, not conſtitute againſt the ſecond huſband *ſtante matrimonio*, could not be brought againſt him after the diſſolution thereof, far leſs againſt his repreſentatives.

Anſwered to the *firſt*, That the purſuer was no writer or agent, and run accompts with no body, neither was he a merchant; ſo that he could

could not be included either under the words or meaning of the act 83. Parl. 6. *James* VI. It has indeed been juſtly found, that writers accompts are comprehended in the general clauſe, becauſe the laying out of money and managing proceſſes, being their proper buſineſs by which they live, their accompts are not preſumed to lye over; and indeed they bear a great reſemblance to merchants-accompts: but the purſuer lives in the country on his eſtate, and concerned himſelf in the affairs of his niece, as her *negotiorum geſtor*, and his caſe is much the ſame as that of a factor, who, in the courſe of his conſtituent's affairs, laid out money for merchant-goods, or any other articles comprehended in that ſtatute. In like manner, if a curator had laid out money in affairs of like nature with this, and ſhould neglect to have his accompts ſettled for five or ſix years after expiration of his curatory; could it be pretended, that he would loſs what he could ſhow he had laid out for his minor's behoof, to lawyers, writers, *&c.* by the preſcription taking place againſt him. On the contrary, it would appear, that a curator could demand repetition of what he had laid out as above, at any time within the 40 years before the ſtatute 1696, otherwiſe there had been no uſe for that act, if a preſcription of three years had formerly taken place; but the reaſon of the law is to obviate the inconveniency, both to minors and curators, of having their accompts lying over their heads for 40 years; and there appears no reaſon of a difference betwixt a curator, a factor, and a *negotiorum geſtor*, in this particular.

To the 2d, it was *anſwered*, That the whole expences laid out by the purſuer, was evidently for the profit of Mr *Walter Stewart* the ſecond huſband, who was benefited thereby, and as he was *lucratus* by the marriage, his repreſentatives ought in ſo far to be liable, notwithſtanding the debt was not conſtitute againſt him *ſtante matrimonio*.

Replied, It can make no difference that the purſuer is no writer or merchant, for the act doth not conſider the creditor, but the nature of the debt. If it be an accompt, or money laid out, without a written obligation, the law does not allow action for payment of the debt after three years, unleſs by writ or oath of party. Neither will the parallel betwixt factors and curators, their accompts not preſcribing in three years, apply to the preſent caſe. For factors have expreſs commiſſions for what they do; and their factories muſt regulate their accompting: And curators have their office by the law, which is equivalent to the moſt expreſs written factory. Nor is there any difference betwixt an agent and a *negotiorum geſtor*. Every agent's accompt conſiſts not only of money for his own pains, but chiefly in money paid to lawyers, clerks, *&c.* And yet it never was imagined that agent's accompts did not preſcribe on that account. And indeed, as moſt of the articles of this accompt are deburſements in proceſſes, which the purſuer pretends he undertook the management of for his niece; theſe fall directly under the denomination of agent's accompts. And with reſpect to the other articles, being the expence of the firſt huſband's funeral charges; as the preſcription has evidently taken place againſt the original creditors, the defenders can ſee no reaſon why it ſhould not be good againſt the aſſigney; which is putting the thing in the moſt favourable light for the purſuer, *viz.* that he had taken aſſignations to the ſeveral accompts paid by him. In which caſe, every defence competent againſt the cedent, is competent againſt the aſſigney.

And, with regard to the 2d defence, it was *obſerved*, That the huſband was not *lucratus* by the money laid out by the purſuer; however, as that might involve the defenders in a proof, which behoved to be attended with trouble and expence, they were willing to reſt their cauſe chiefly on the firſt defence.

The Lords found, That the triennial preſcription does not take place in this caſe. But found, That the purſuer cannot have action for the accompts purſued on, the debt not being conſtitute againſt the husband ſtante matrimonio, *unleſs he prove the husband was* lucratus *by the marriage.*

N° CXLVIII. *February* 22. 1740.

Competition, Executors of the deceaſed Mrs *Anna Leith*, with the Creditors of the deceaſed *William Forbes* of *Tolquhon* her husband.

Dies inceptus habetur pro completo.

THE ſaid Mrs *Anna Leith*, being provided to an annuity of 20 chalders victual, computing the chalder at 100 merks *Scots* money, after her huſband's deceaſe, and ſhe having lived till the morning of *Martinmas* 1738, this queſtion occurred betwixt her executors, and her huſband's creditors, which of them was preferable for the ſame.

The Lords found, That the liferentrix having lived to the Martinmas-*day, albeit ſhe died on the morning of that day, had right to the term's annuity, which fell due at* Martinmas 1738; *and therefore, preferred the executors of the liferentrix to the creditors.*

N° CXLIX. *February* 26. 1740.

Patrick Woodrow Miniſter at *Tarbolton* contra *Cunningham* of *Enterkine*.

Manſe.

IN a queſtion betwixt theſe parties, *The Lords found, That the vacant ſtipends were not ſubject in the caſe of rebuilding the manſe to be applied for that purpoſe.*

N° CL. *June* 11. 1740.

Captain *Alexander Napier*, and *Mariana Johnſton* his Spouſe, contra *Anna Johnſton*.

Conditional clauſe of Return, its effect.

CAPTAIN *Johnſton* of *Kelton* made an entail of his eſtate of *Kelton*, in favours of *Robert Johnſton*, his only ſon, and the heirs of his body; which failing, to *Anna Johnſton* his eldeſt daughter, and the other heirs therein mentioned; but the entail declared *Robert* free of all the reſolutive and irritant clauſes to which the other ſubſtitutes were liable; likeas, the Captain granted a bond of proviſion to *Mariana Johnſton* his youngeſt daughter for 8000 merks. Upon the Captain's deceaſe, *Robert* ratified the above bond of proviſion in favour of his ſiſter, and likewiſe gave her 7000 merks more, payable at the firſt term, year and day after his deceaſe, and which he therein declared revockable at pleaſure, and void in caſe of heirs of his body. To this additional proviſion, the following proviſo was added, *viz.* "That in caſe the ſaid "*Mariana Johnſton* ſhall deceaſe without any child or children, lawfully "procreate of her body, and exiſting at the time of her deceaſe, in "that caſe, the ſaid principal ſum of 7000 merks, *&c.* reſting at the "time of her deceaſe, ſhall return and fall due, and payable to the "ſaid *Robert* and his heirs, repreſenting him in the lands of *Kelton*; "with, and under which burden, theſe preſents are granted and "accepted by the ſaid *Mariana*, and no otherways." *Mariana Johnſton* having, in her contract of marriage with Capt. *Napier*, aſſigned this 7000 merks to him, they brought a proceſs for payment thereof, againſt *Anna Johnſton* the eldeſt ſiſter.

Pled, That no decreet could go againſt the defender, unleſs ſecurity were granted, that, in the event of the condition that all the purſuer's children ſhould die before herſelf, the ſame ſhould become due and payable to the defender, who was heir to her brother in the lands and eſtate of *Kelton*. In ſupport whereof, it was *obſerved*, That this was not a ſubſtitution of whatever kind, which may be diſappointed for certain onerous deeds of the inſtitute, unleſs it is clogged by prohibitory clauſes: But that it is a condition impoſed upon the right, which can be no more voided by onerous deeds, than by gratuitous ones. The condition muſt have its effect, and ſuſpend or reſolve the right, according to the exiſtence or non-exiſtence of it. The very manner in which this proviſion is conceived, demonſtrates it to be a condition. It is provided, That in caſe *Mariana*, the creditrix and donatar, ſhall deceaſe without children exiſting at the time, the ſums ſhall become due and payable to *Robert Johnſton* of *Kelton*, his heirs in the lands of *Kelton*. From which it was plain, that the ſum, if paid, muſt be repeated in the above event; and conſequently, the bond is granted, and the ſum made payable, upon condition that the ſame ſhall be repeated upon the exiſtence of the foreſaid uncertain event. Further, it is not a return of the ſums to *Kelton* himſelf, and his heirs, but it is an obligement, whereby the ſums ſhall become

due

and payable to *Robert*'s heirs in that eſtate by *Mariana*, in caſe ſhe received the ſame.

Again, by the latter part of the clauſe, it is expreſsly declared, that the bond was granted by *Kelton*, and accepted by his ſiſter, under the burden of the above condition; ſo that this was plainly a gift *ſub modo*, ſubject to the condition therein ingroſſed. And as this was altogether a gratuitous grant, it can only be effectual on the terms it was given; neither can *Mariana*'s aſſigning thereof to her huſband void the condition, as that is a quality which muſt accompany the right; and that the condition refers to the exiſtence of children lawful of her body, the time of her death, which therefore ſuppoſes, that it behoved to take place after her marriage.

Anſwered for the purſuers, That ſuch clauſe of return or ſubſtitution of the granter himſelf and his heirs, has never been underſtood to operate further than to exclude voluntary or purely gratuitous deeds, in prejudice thereof, and it has always been held, that ſuch return might be defeated by aſſignations for onerous cauſes; ſee 28th *February* 1683, *January* 1679, *Drummond*, 10th *February* 1685, *Mortimer*. More particularly, there was no reaſon to inſiſt upon caution for repayment in caſe Mrs *Napier*'s children ſhould predeceaſe her; becauſe, by the bond, the money is payable at the firſt term after year and day from the granter's death, which is long ſince elapſed; and it is not denied, that the money is now exigible, and the import of the condition is plainly no more, than that the ſame might afford an exception or defence to the granter's heirs againſt the executors of his ſiſter; ſo that the granter or his heirs could not be compelled to pay what ſhould be reſting at the death of *Mariana*: But if ſhe ſhould live till after the term of payment, and ſhould uplift the ſame, there are no words in this clauſe, providing that the heir of her brother might have recourſe againſt her repreſentatives, by way of action for repetition of the like ſum. But the purſuer Capt. *Napier*, who has right to this bond as an onerous aſſigney in his marriage-articles, inſiſts, that the clauſe can have no effect whatever againſt him; more eſpecially, conſidering the tenor thereof, as it concerns only ſuch part of the money as ſhould be reſting at the death of *Mariana*; and that therefore he is intitled to a decreet for the ſums libelled, without any quality or reſervation whatever.

The Lords found, That the clauſe of return of the 7000 merks contained in Robert Johnſton *of* Kelton *his additional bond of proviſion was effectual, in caſe the condition expreſſed in the clauſe of return ſhould exiſt, notwithſtanding of the aſſignation in the contract of marriage between Capt.* Alexander Napier, *and* Mariana Johnſton *the purſuers; and that the ſaid purſuers, upon payment of the ſaid ſum, muſt find caution to repeat the ſame in the event of the exiſtence of the condition mentioned in the ſaid clauſe of return.*

No. CLI.

N° CLI. *June* 15. 1740.

Presbytery of *Kirkcudbright* contra *Alexander Blair*.

Legacy to pious uſes whether revocked or not.

James Blair of *Senwick*, diſponed to the moderator for the time being of the preſbytery of *Kirkcudbright*, and remanent members thereof, as truſtees for the purpoſes aftermentioned, the ſum of 15,000 merks out of the firſt and readieſt of his means and eſtate pertaining to him at his death; and obliged his heirs, executors and ſucceſſors, to pay the ſame at the firſt term after his deceaſe. And for their better ſecurity, and more effectual payment of the ſaid ſum, he aſſigned and diſponed in their favours, all and ſundry debts and ſums of money, either heritable or moveable, due and addebted, or that ſhould be due and addebted to him at the time of his death by bond, bill, *&c.* or any other manner of way; and ſpecially but prejudice of the foreſaid generality, he aſſigned and diſponed to them ſeverally, ſums addebted to him by certain perſons; after which followed the particular articles of ſums of money due him, extending in all to near 20,000 merks; after which the deed proceeds thus, and which ſum of 15,000 merks, I ordain the ſaid truſtees to pay in the manner, and for the charitable purpoſes after ſpecified, and then follows the names of 24 pariſhes, to the miniſters, heritors, and elders of each pariſh, for the behoof of the poor of their reſpective pariſhes, he orders his truſtees to pay to every pariſh 1000 merks. And the deed concludes with the following proviſo, That in caſe it ſhall happen that my means and eſtate hereby diſponed, ſhall, at the time of my deceaſe, either fall ſhort of, or exceed the ſum of 15,000 merks; then, and in that caſe, I hereby deſtinate and appoint, that each of the pariſhes above mentioned, ſhall ſuffer a defalcation, or have an additional ſum added, proportionally to the foreſaid ſums hereby mortified to them as ſaid is.

Poſterior to this deed, *Senwick* acquired *Caſtramon*, part of the eſtate of *Ruſco*, at a public roup before the Lords, ſold his eſtate of *Senwick*, exacted the debts aſſigned by the above deed, and applied the ſame toward payment of the price of the lands purchaſed; after which he died. And *Blair* of *Dunrod* his brother, having entered himſelf heir to him, and confirmed what remained of *James*'s perſonal eſtate as creditor to him, the preſbytery brought an action againſt *Dunrod*, for recovering the mortified ſum.

The defence offered was founded on this maxim of law, That ſpecial legacies of particular ſubjects, or bonds, are tacitly revocked by the teſtator's alienating the thing, or exacting the ſums in the bonds voluntarily in his own life; for that ſhows he had no mind the ſame ſhould go to the legatee, *Inſt.* § 21. *De legatis*, *l.* 21. *ff. De liber. legat.* Here the granter aſſigns all his debts, heritable and moveable, which he then had, or ſhould have the time of his death, but does not ſubject his lands of *Senwick*; ſo that this mortification was to be made good out of theſe bonds, and the land-eſtate go to the heir, as not ſubjected to

the legacies. Now, ſince in place of *Senwick*, he purchaſed other lands of a much greater value, and applied the bonds ſpecially aſſigned to the truſtees toward defraying that purchaſe; what other intent could he have, but to benefit his heir, and deprive the legatees of his intended gratification? The heir in the defunct's land was to be free by the mortification, and providing his eſtate is not ſubjected, he does not oppoſe the legatee's taking what ſhall remain free of the ſubject alloted by the defunct for payment of their legacy. As the caſe would thus ſtand upon the general principles of law, ſo the laſt mentioned clauſe puts the matter beyond controverſy; for to the aſſignation of the bond, generally and particularly, there is ſubjoined an appointment by the defunct, to lay the ſame out upon intereſt; but as he uplifted the ſums himſelf, there can be no doubt, that he thereby voided the mortification; and which is further evident, from the latter part thereof, declaring, "That "in caſe his means and eſtate ſhould, at the time of his death, fall "ſhort of, or exceed the ſaid ſum of 15,000 merks, each of the pa- "riſhes ſhall ſuffer a defalcation, or have a further ſum added propor- "tionally to the foreſaid ſums thereby mortified." Now, as it is clear, that if the defunct had converted his whole land-eſtate into money, and lent it out on bonds, it would all have gone among the pariſhes, tho' it had been twice 15000 merks, that by the ſame rule, his exacting the bonds due to him, and converting the ſame into a land-eſtate, muſt diminiſh, yea extinguiſh this legacy, by the expreſs terms of the ſettlement.

Anſwered, There is not the leaſt reaſon to apprehend, that the defunct altered his charitable deſign, that this mortification ſhould be effectual, or that he meaned to revock or alter the ſame, by the accidental alteration of the ſubjects, whereof his eſtate conſiſted; for it appears from the whole ſtrain of the ſettlement, from the poſitive bond or obligation upon the granter and his heirs, to pay the ſum mortified, and from the manner in which the aſſigning clauſe is introduced, *viz.* for the better ſecurity, and more ſure payment of that ſum, that a ſpecial legacy, or aſſignation of certain ſubjects only, was not intended; but that the funds were pointed out and appropriated for the purpoſe expreſſed by the granter for the ready execution of his purpoſe. It is true, the laſt clauſe ſeems to be drawn with inaccuracy, and not exactly conformable to the main deſign of the deed; but ſurely an argument of intention drawn from the inaccuracy of the writer, is not ſufficient to defeat the intention of the writer, expreſſed in the direct and principal clauſes of the deed. One part of what is provided in this laſt clauſe might be reaſonable and *inerat de jure*, namely, if the diſponer's funds ſhould fall ſhort, each of the pariſhes ſhould have a defalcation, as ſome of the debts might periſh by the failure of the debtors, or be uplifted by *Senwick* in his own lifetime; but the other part thereof, *viz.* in caſe his means ſhould exceed 15,000 merks, *&c.* it muſt be confeſſed is not ſo eaſily reconciled with the main ſcope of the deed; however, whatever incongruity there may be therein, the purſuers inſiſt it is not ſufficient to make the deed to be conſtructed as if it contained no ſuch bond for the 15,000 merks; neither will it follow, that the uplifting the ſums aſſigned, and laying the ſame out upon other funds, would have imported an alteration of the legacy; for, ſuppoſing this a ſpecial legacy, (which it is not), the ſale of a ſubject ſpecially legated, or voluntary

uplifting

uplifting of a debt, does not always import an ademption; for it may appear from circumstances, that this was done by the testator, without any intention to alter or revock; see *l.* 11. § 12. and 13. *De legatis tertio:* And the present case affords an example of the same kind; for the alterations of *Senwick*'s affairs were brought on *necessitate urgente*, he being found liable as heir of provision to his father *Rusco*, and so obliged to purchase part of that estate, to save his own.

Replied, That with respect to the argument drawn from the obligement on *Senwick*, his heirs and successors, to pay the 15,000 merks at the first term after his decease, the clause behoved to be taken wholly and together as it stands, and the former part must receive a just interpretation and limitation from the latter, as there is a plain variation in some particulars, and if so, it is certain, that this obligement, however seemingly extensive, must fall to the ground, when the funds specially alloted for its satisfaction, under a quality that it should receive its measure or extent therefrom, fail or come short. Next, this part of the clause founded on by the pursuers, is expresly with and under the conditions and provisions after mentioned, one of which was, That in case the said subjects should fall short, the dividends among the respective parishes should receive a proportional diminution; and in case they should exceed the said sum, a proportional increase: so that, according to this view of the deed, it is not tenible to plead, any thing could be due of this legacy, if the whole fund was extinguished by the defunct's own act; it appears beyond contradiction, that the intent was, that his personal estate should only go to make it good, and that it was not to touch the heir in the land-estate, as indeed it could not, considering it was introduced as a testament. And with regard to the alledged necessity on *Senwick*, to purchase the lands of *Castraman*, it was observed this was no such necessity as the law could mean. The necessity the law intends, is, where the debtor forces the money upon the testator, so that the uplifting it, is not properly an act of his, and consequently cannot infer his revocation of the legacy, unless the heir plainly show he intended it. Besides, it is ridiculous to imagine, that the defunct would have purchased the lands of *Castraman* at such an advanced price, (38 years purchase), so as the superplus price, beyond the true value, would have more than exhausted his own estate of *Senwick*, for that would be to suppose he was throwing away the value of that estate in order to save it. In a word, it is absurd to suppose, the defunct was under the least necessity to purchase these lands. It was a voluntary and rational act of his own, in order to save to himself and his heirs that part of the family-estate, of which he was descended; and however great the price may seem, it was the lowest any of the parcels sold at, neither were any of the purchasers losers by their bargains.

The Lords found, That the deed of mortification subsisted only for such of the debts specially assigned, as remained unuplifted at the death of James Blair *of* Senwick *the mortifier.*

But upon a reclaiming petition and answers, *The Lords found, That the orders to uplift and apply the several sums, which were the fund of the mortification, not being executed, do not import a revocation of the mortification; and therefore adhere.*

N. B.

N. B. After this it would ſeem there was an act pronounced before anſwer, and a great deal of further litigation; but the Collector has not the papers.

N° CLII. *June* 16. 1740.

Gordon of *Ellon* contra Dr *Cunningham.*

Clauſe in a miſſive, whether obligatory or not?

William Livingston, intending to retire from buſineſs, wrote a letter to *Gordon* of *Ellon* his brother-in-law, informing him that he had L. 200 Sterling in caſh by him, which he would willingly ſink for an annuity of 12 *per cent.* during life, in accepting of which, ſays he, you may both ſerve yourſelf and me, and then adds, "For, if you conſider "the thing right, I won't have my principal and intereſt in 15 or 16 "years; if I die before that time, you'll be a gainer; if I live longer, "ſo as to receive above my principal and intereſt, *aſſure yourſelf, I ſhall "make it good one time or other to ſome of yours.*" In conſequence whereof, Mr *Gordon* accepted the L. 200, and granted his bond to Mr *Livingſton* for the annuity, which he paid regularly during *Livingston*'s life; and as he lived a conſiderable time after this bargain, whereby the annuities paid, and intereſt thereof, amounted to a larger ſum than the L. 200, and intereſts from the time Mr *Gordon* received it, his heir brought an action againſt Mr *Livingston*'s ſucceſſor, upon the above letter, to make up the loſs incurred by the advance of the annuity beyond the principle and intereſt of L. 200 Sterling.

Amongſt other defences, it was *pled*, That the words of the letter were not capable of being conſtructed into a legal obligation. Mr *Livingston* acquaints Mr *Gordon*, That he had L. 200, which he would willingly ſink for an annuity during life: He makes the firſt offer of this bargain to his friend; if it had been rejected by him, he would probably next have propoſed the bargain to a ſtranger; he ſets forth the great probability there is of Mr *Gordon*'s being a gainer, the little chance there is of his being a loſer, which ſhowed a bargain of chance was to be undertaken, and no abſolute ſecurity given to Mr *Gordon* againſt any poſſible loſs. Mr *Livingston* computes, that he would not have his principal and intereſt in 15 or 16 years: He adds, *if I live longer, ſo as to receive above my principal and intereſt, aſſure yourſelf, I'll make it good one time or other to ſome of yours.* That theſe words were too general and undetermined for conſtituting of an obligement which could produce any legal demand, and ſuppoſe *Livingston* had left a legacy to any of Mr *Gordon*'s family, payable at ever ſo diſtant a term, or that he had made a preſent to any of them in his own life, there could be no doubt, that either the one or the other muſt have been conſtructed full ſatisfaction of the purpoſe here expreſſed. Mr *Livingston* could not, by words of this nature, be underſtood creating any obligation either on himſelf or his heirs; all that can be gathered from them is, a kindly purpoſe and reſolution he then had to Mr *Gordon*'s family; but as they go no further

than

than a reſolution, it depended upon an after conſideration, whether they were to have any effect or not.

Anſwered, That the aſſurance given in the letter was no compliment, but underſtood by both parties to be obligatory; Mr *Livingston* on his part, carefully booked his part of the tranſaction in his copy-book of letters, where it yet remains; and, of the other part, Mr *Gordon* wrote on the back of the letter, Mr *Livingston*'s letter obliging himſelf, in caſe I loſe by the annuity of the 200 pound Sterling I have received for L. 24 Sterling *per* annum, to make it up to me and mine. Further, that in a tranſaction betwixt merchants, an aſſurance to make good, is of the ſame import as an obligation binding and obliging among perſons verſed in ſtile, of which merchants may be preſumed to be altogether ignorant. If Mr *Livingston* had wrote from *London* to his brother-in-law to pay ſuch a debt for him, or to make a gift in his name to any relation, and at the ſame time, aſſured his brother-in-law that he would make the money ſo to be advanced good; it is thought, Mr *Livingston* would have been as much bound to repay the money, as if he had bound and obliged himſelf in way of bond to repay it. And although there is no fixed term for the repayment, it will not from thence follow, that the party ſo obliged was not debtor at all, and that *ſome time or other* imports no time. The plain meaning is, he had a diſcretionary power as to the time of ſatisfying the debt he had undertaken, but ſatisfy it he muſt ſometime or other, that is, in his lifetime, or by ſuch deed executed in his lifetime, as might make it effectual after his deceaſe. And the words of the letter, *ſome of yours*, certainly muſt be taken for one or other of Mr *Gordon*'s children; ſo that if the defender could ſhow that Mr *Livingston* had made good this ſuperadvance to any one of the children, it might operate a diſcharge of the debt; but this cannot be qualified.

The Lords found that Mr Livingſton *was not bound by his miſſive letter, to make good or repeat to Mr* Gordon *the annuities paid by his father or himſelf over the principal ſum of* 200 *pound Sterling, and intereſt thereof.*

No CLIII. *July* 22. 1740.

James M'Garroch Miniſter at *Eskdalemuir*, contra *William Scot* in *Holm.*

A charge on a decreet of modification and locality, cannot be ſuſpended but on conſigation.

MR *M'Garroch* having obtained a decreet of modification and locality, whereby there was allocate a certain ſum to him out of the lands of *Davington*, he charged *Scot* the tenant for payment, who offered a bill of ſuſpenſion, craving the ſame might be paſt upon caution without conſignation, upon this ground, that the 6th Act 1669, which diſcharges the ſuſpenſion of miniſters ſtipends otherwiſe than upon con-

ſignation, concerns only the caſe where the miniſter has a ſpecial decreet for the ſums charged for; conſequently, the Statute does not touch charges upon general letters which may be given at random, but where a decreet is taken in an ordinary action, for payment of the ſums charged for, which is called in the Statute, a Special Decreet.

Anſwered: This is not a charge upon general letters, but it is founded upon a ſpecial decreet of modification, *&c.* whereby a particular ſum is allocate upon particular lands, and the heritors, *&c.* are decerned to pay the ſum ſo allocated; and if this charge could be ſuſpended without conſignation, it is eaſy to ſee how miniſters might be diſtracted by pleas, before they got payment of their ſtipend: miniſters have now only alimentary proviſions out of the teinds, and the law has provided, in their favour, that ſuſpenſions of their ſtipends ſhould not ſo eaſily paſs as in other caſes, that they may not be withdrawn from their charges by unneceſſary law-ſuits for recovering their ſtipends. It is frivolous to pretend, that by ſpecial decreets in the act of parliament, are meant decreets taken upon an ordinary action againſt particular perſons for payment of particular ſums: For, though ſuch decreets may be neceſſary, where the miniſter has nothing to found upon but uſe of payment; yet where he obtains a decreet of locality, that is a ſpecial decreet, upon which he can, without neceſſity of an ordinary action, charge the poſſeſſors of the grownd; and if it were otherwiſe, he could have little benefit from the act, by a decreet of locality, in caſe he were obliged to conveen the tenants upon every occaſion in an ordinary action.

The Lords paſſed the bill upon conſignation only.

N° CLIV. *July* 25. 1740.

Aliſon and *Jean M'Banes* contra *William Ormiſton.*

Can perſonal diligence be obtained after poſſeſſion attained upon an adjudication.

THE *M'Banes* being creditors to *Ormiſton*, adjudged ſome tenements belonging to him, upon which they afterwards took out a decreet of mails and duties, and recovered ſome ſmall ſums due of the rents of theſe tenements. But as there was ſtill a conſiderable part of the debt not paid, they applied for a horning on the decreet. And for them it was pled, That there was nothing to hinder a creditor's uſing all the diligences the law has provided, either againſt the perſon or effects of his debtor, until he thereby operate his payment; that the matter had been carried ſo far by the practice of the court, that ſeparate diligences led againſt different ſubjects, whether belonging to the ſame or to ſeveral co-debtors, are found intitled to be ranked each for the whole debt upon every ſeveral fund, but ſo as the debt ſhall be once drawn out of them all; ſo much does the law favour the accumulating diligences, when the intent is only to draw once payment of a juſt debt: ſo that it would ſeem contrary to the genius of the law, to maintain, that becauſe a creditor had once led an adjudication, by which he was not

not able to operate his payment; therefore it ſhall not be now competent to him to affect a new ſubject of his debtor's, which he may afterwards diſcover, either by adjudication, arreſtment, or any other diligence. And if that is competent, there does not appear any reaſon why perſonal diligence ſhould not alſo be competent, if that is found the propereſt and eaſieſt method of making the debt effectual: Nor that it ſhould make any odds whether the adjudger has been in poſſeſſion or no, except that, in ſo far as he has been in poſſeſſion, his diligence muſt be reſtricted; and, if he does not ſo reſtrict, it will ſurely be found unwarrantable.

As to the ground of doubt ariſing from the act 1672, it is plain the clauſe for bidding diligence to be uſed by an adjudger, only refers to the caſe where the adjudger is in poſſeſſion by virtue of a ſpecial adjudication, by which the lands adjudged muſt amount to the full value of the debt and a fifth part more; and it is ſubſequent to this part of the Statute, that the general adjudication is introduced, to which there is no proviſion annexed againſt the creditors doing other diligence either againſt his debtor's perſon or other effects; but the matter is left upon the ſame footing as it was by the former law, which does not hinder a creditor to uſe all manner of diligence until he recover actual payment of his debt.

The Lords paſſed the bill of Horning.

N. B. There was no Memorial in this caſe, but one for the *M'Banes.*

No CLV. *November* 6. 1740.

Thomas Wilkie Merchant in *Cowpar* of *Angus*, contra *Thomas M'Neil* Merchant there.

Is action competent on a bill granted for prohibited goods.

THE ſaid *Thomae Wilkie* purchaſed from one *Patrick Wallace* merchant in *Aberbrothwick*, 33 ankers of brandy, which were to be delivered to him next day at *Hayſton*, and next morning *Thomas M'Neil* (who was preſent at the bargain) came to *Wilkie*, who was then going to receive the brandy, and deſired that he would allow him to be a partner for 13 ankers of the cargo. *Wilkie* agreed to the propoſal, and in order to execute the ſame, he drew a bill on him for the price of the quantity (which he conſented to give him) payable to *Wallace*. *M'Neil* accepted the bill, and gave it to *Wilkie*, to be delivered to *Wallace* upon receiving the brandy. After this, *Wilkie* went to *Hayſton* and received the brandy, and gave *Wallace* Mr *M'Neil*'s bill for the price of the 13 ankers, and his own for the remainder. But in his way home, a cuſtomhouſe officer ſeized the whole.

Mr *Wallace* the ſeller inſiſted againſt *Wilkie* for payment, not only of his own bill, but likewiſe for payment of *M'Neil*'s bill, ſince *Wilkie* had ſigned the ſame as drawer.

Wilkie

Wilkie having been obliged to pay *M'Neil*'s bill to *Wallace*, and having got an aſſignation thereto, proceeded to diſcuſs the ſuſpenſion of a charge which had been given by *Wallace* to *M'Neil*.

For the ſuſpender it was pled, That though the bill bore value received, yet really and truly no value had been paid for it; that the true cauſe of granting it, was a promiſe to deliver a certain quantity of brandy, which had never been delivered, and that by the act 29. *Ann.* ii. *Geo.* I. All bargains with reſpect to an unlawful ſubject of commerce or prohibited goods, ſuch as brandy, though not expreſsly annulled, was virtually ſo. And as *Wilkie* has acknowledged, that the cauſe of the bill was run brandy to be delivered to the ſuſpender, which he might have ſeized, notwithſtanding his bargain, had it been offered to him, its being ſeized by a cuſtomhouſe officer cannot vary the caſe. *M'Neil* was never concerned in the bargain with Mr *Wallace* the original proprietor of the brandy, but was to receive a certain quantity of it; and ſeeing it was not delivered, the riſk ought, before delivery, to fall on *Wilkie* the ſeller. See *Scougal* againſt *Young* and *Gilchriſt*, *l.* 34. § 1. *ff. de contra Empt.*

Anſwered, That delivery to *Wilkie* for his own and the ſuſpender's accompt, at his deſire, was delivery to himſelf? that as he was admitted to a ſhare of the bargain with *Wilkie*, he muſt run the ſame riſk. If indeed the charger had ſold him the brandy upon an advanced price, more than had been agreed for with *Wallace*, it might juſtly have been ſaid, that before the brandy was delivered to the ſuſpender, the goods behoved to periſh to *Wilkie*: But that was not the caſe; the ſuſpender was witneſs to the whole of the bargain with *Wallace*, deſired next day to have a ſhare in it, and intruſted *Wilkie* with the receiving the goods for both their accounts. It is impoſſible therefore to imagine that *Wilkie* could undertake the riſk and expence of tranſporting the ſuſpender's ſhare of it, when he was not to get a farthing by it. And that after the brandy was delivered, the property of the ſuſpender's part was as much his, as that of the reſt was *Wilkie*'s: So that when the whole periſhed, or was loſt, each parcel muſt be loſt to its proper owner. See *Numb.* 40. *Home*'s *Deciſ.*

The Statute does not concern this caſe; for the penalties thereby impoſed upon the buyers or ſellers, in favours of the one againſt the other, if he ceaſed to take the advantage, cannot apply, where one for his own and another's behoof, gets a bargain of brandy, or any ſuch run-goods, delivered to him. For to be ſure, one of the partners cannot ſeize in prejudice of the other, or ſubject the other more than himſelf to any hardſhip, as the hazard muſt be common where the ſubject itſelf is ſo.

The Lords found there was ſufficient evidence, that the charger and ſuſpender were partners in the bargain as to the brandy purchaſt from Wallace, *and found that the delivery by* Wallace *to* Wilkie, *was equal to the delivery to* M'Neil; *and therefore repelled the reaſons of ſuſpenſion.*

N° CLVI.

N° CLVI. *November* 7. 1740.

Sir *Robert Pringle* contra *Robert Biggar.*

In a reduction of a bill on the act of the 9th of Q. Ann, *it is competent to prove by the winner or his truſtee, that the ſame was granted for money loſt at game, even againſt onerous aſſigneys.*

SIR *Robert* being creditor to Mr *John Alves*, uſed arreſtment in the hands of Mr *Biggar*, who was debtor to Mr *Alves* in ſeveral bills, which were taken in the name of Mr *Gilbert Pringle*, as truſtee for Mr *Alves*; and, in a forthcoming raiſed thereon by Sir *Robert*, Mr *Biggar* repeated a reduction of the bills upon the act 9. *Ann. cap.* 14. and offered to prove by Meſſ. *Alves* and *Pringles* oaths, that the bills were granted for money won at game.

Anſwered for Sir *Robert*, That it was a maxim in law, That the oath of the cedent was not competent in prejudice of an onerous aſſigney, whether legal or voluntary, and as the ſtatute had introduced no alteration from the common rules of law in this particular, they behoved to apply to the preſent caſe. The ſtatute annuls bills, bonds, *&c.* granted for money won at play. It likewiſe enacts, That where a party loſes at game and pays, he ſhall have action of repetition within three months, and that the party woning money at game, ſhall be obliged to anſwer upon oath, with reſpect thereto; but it no where ſays that ſuch oath ſhall be probative againſt third parties, the onerous creditors of the winners of ſuch money; ſee *Neilſon's Abridgment, p.* 893. *Verb. Gaming. Cornelius Neilſon* againſt *Bruce.*

Replied, That the nullity in the ſecurity granted for money won at game was general, affecting all perſons whatſoever, who had or might come to have intereſt therein, and was indeed a *vitium reale* in ſuch ſecurities, introduced by ſtatute, with a *non obſtante* as to all laws and cuſtoms in the contrary thereto. As to the mean of proof, by the oath of the winner at game, the words of the third clauſe of the act, declaring it competent, are general, as well as the nullity itſelf, and the ſaid clauſe, tho' the winner or original creditor in the bills were not a party to the ſuit, they might be compellable to anſwer upon oath, whether or not the ſum in queſtion was won at game, which muſt hold ſtronger in this caſe, where the winner at game, and his truſtee, are the only parties called, or that properly fell to be called in this proceſs of reduction. If it were true, that no more was neceſſary for avoiding the effect of the ſaid clauſe, than for a gameſter when he is ſued upon the act, to get a creditor of his to arreſt in the purſuer's hands, and plead, that the gameſter, or his truſtee's oath could not be taken, it is obvious, according to that explanation, the clauſe could be of no effect, ſeeing ſuch a remedy could never be wanting; ſee *July* 1735, *Gillon*, *February* 1731, *Pringle.*

Duplied, The rules of law are not to be altered upon imaginary inconveniencies, without ſtatute; and as it is directed only againſt the winner, without ſpeaking of onerous aſſignees, they are intitled to the

the common benefit of law: but there is really no inconvenience in the caſe; for if the loſer be minded to take the advantage of the ſtatute againſt the winner, he has no more to do, but bring his action in terms thereof; and when the matter is rendered litigious, he will have the benefit of the winner's oath in prejudice of any onerous aſſigney, and if he is not diſpoſed to take that benefit againſt the winner, but would take the advantage againſt an onerous aſſigney, there is no good reaſon why he ſhould have right to ſuch an option; for even after he has paid to the onerous aſſigney, ſtill he has his action againſt the winner.

The Lords found, That the reaſon of reduction, that the bills in queſtion were granted for money loſt at play, was probable by the oath of Gilbert Pringle *and* John Alves, *or either of them.*

N° CLVII. *November* 7. 1741.

Competition betwixt *Blackwood* of *Pitreavie*, and the Repreſentatives of *Robert Colvill* and *Andrew Ruſſell*.

An Infeftment granted to Repreſentatives of a man named, is null.

SIR *George Hamilton* having right to an heritable bond on the lands of *Didup*, diſponed the ſame (among other funds) to his creditors; in which, after enumerating ſeveral debts due to particular creditors, he adds, *Item, to repreſentatives of the deceaſed* Andrew Ruſſell *merchant in Rotterdam*, ſpecifiing the particular ſum due to them. *Item, to the repreſentatives of the deceaſed* Robert Colvill, the ſum of, *&c.* And the diſpoſition further recites, That the creditors, in whoſe favours the ſame was granted, had condeſcended to accept of their reſpective funds therein ſpecified, for their further, ſecurity in corroboration of the ſeveral debts due to them, without any preference to any of the creditors, but all to have a joint intereſt therein; and it likewiſe contained a precept upon which ſeiſin was taken.

In the ranking and ſale of the lands of *Didup*,

Blackwood of *Pitreave*, who had right to a debt due by Sir *George*, upon which an adjudication had been led, appeared and claimed to be ranked for ſo much of the heritable bond adjudged, as was not exhauſted by prior valid infeftments; and particularly upon that part of the ſubject which was claimed by the repreſentatives of *Colvill* and *Ruſſell*; to whom he objected, That the infeftment being given imperſonally to the repreſentatives of certain people deceaſed, the ſame was altogether invalid and inept, ſeeing it was impoſſible a feudal right could be conſtituted otherwiſe than to a certain perſon, one or more *nominatim*, who ſhall thereby become the vaſſal to the granter of the infeftment, and by the law of *Scotland*, muſt appear in the regiſter of ſeiſins to be veſted in ſuch feudal right, ſo as third parties may know from whom they can ſafely purchaſe or acquire, or whom they ſhall call as defenders in a reduction and improbation. Now, if the infeftment thus given imperſonally to repreſentatives, was void and null, it followed, that the ſub-

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ject diſponed, in ſo far as concerned the predeceſſors of thoſe repreſentatives, and which was intended to be ſecured by this infeftment, did truly remain with Sir *George Hamilton* the granter, who was never effectually diveſted thereof, until it was taken out of his perſon by *Pitreavie*'s diligence, namely, the adjudication of this ſubject, and infeftment following thereon; ſee *Craig, tit. de ſaſinis, n.* 4. *Stair*, upon the requiſites of a ſaſine, and the deciſion betwixt the Duke of *Norfolk* and Sir *William Billers*.

Anſwered, That there is nothing in the feudal law of *Scotland*, that requires, that, in a precept of ſaſine, the perſon intended to be infeft, ſhould be deſigned by his Chriſtian name and ſirname; that the direct contrary is true. For inſtance, a charter granted to one, his heirs and aſſignees, containing a precept of ſaſine, is a good charter and precept, not only in favours of the vaſſal named in the charter, but alſo in favours of his aſſignees, voluntary or legal, independent of the ſtatute 1693; and therefore *Pitreavie*'s doctrine, that the ſuperior muſt know his vaſſal, and that the ſame is not to be left to the judgment of his baillie, is contrary to the eſtabliſhed principles of the feudal law. So that the objection comes to this, that the ſaſine given to the attorney for the repreſentatives, is null, becauſe its given to no particular perſon. As to which it was obſerved, that no body ever doubted, there could not be a feu without a vaſſal and ſuperior; but then no law has required, that the vaſſal, and much leſs that the creditor, ſhould in the ſaſine be deſigned by his Chriſtian name and ſirname, and that ſuch omiſſion ſhould infer a nullity, witneſs the caſe of infeftments granted to bodies politic and corporate, where there is no perſon infeft by name and ſirname; nor is it any anſwer that the body politic *ſuſtinet vicem perſonae*; for ſtill this proves that the name of the vaſſal is not neceſſary to the validity of an infeftment; and that if the vaſſal is ſufficiently deſcribed, ſo as he may be known, tho' the particular perſon in the fee does not appear from the infeftment, it is no nullity; and therefore, as in the preſent caſe, the repreſentatives of *Andrew Ruſſell*, in the moveable bond due to him, could be none other than his executors confirmed to him, to wit, his own daughters, who were confirmed to him at the date of the diſpoſition, and the repreſentatives of *Colvill* in the bonds due to him, ſecluding executors, behoved *quoad* the principal ſum to be his heirs of line, ſerved and retoured, there was no uncertainty as to the perſon of the vaſſal. Beſides, there were many infeftments not granted to perſons by name and ſirname, ſuch as grants of lands to peers, deſcribed by their title of Duke, Earl, *&c.* The grant of the revenues of the religious houſes in *Perth*, to the poor members of *Jeſus Chriſt*, grants to the virgin *Mary* and the other ſaints, and thoſe to the ſeamen of *Leith*, which has been ſuſtained by the court, tho' theſe laſt are not a body politic.

Replied, Rights granted to bodies politic, having a *nomen juris*, and perpetual ſucceſſion, are perſons known in law, and the infeftments given to them, or their adminiſtrators in name of the ſociety, are equivalent to the infeftment given to a particular perſon by name and ſirname: And as to the ſocieties not incorporated, *Pitreavie* is not bound to impugn their titles; poſſibly ſome of theſe, by long uſage or poſſeſſion, may have acquired a right to hold their acquiſitions, but it is believed an infeftment given for the uſe of ſuch ſocieties, would be ill adviſed,

if

if it were not given to certain perſons *nominatim* for the uſe and behoof of ſuch voluntary ſociety, otherwiſe an infeftment given to the free maſons of the lodge of *Edinburgh* or *Leſmahago*, would conſtitute a valid feudal right, without expreſſing the name of the grand maſter for the time being.

The Lords ſuſtained the objection made to the ſaſine following upon the diſpoſition granted by Sir George Hamilton, *in ſo far as relates to the repreſentatives of* Ruſſell, *and the repreſentatives of* Colvill.

N° CLVIII. *November* 18. 1740.

William Hedderwick contra *James Campbell.*

Deathbed.

William Pringle, upon deathbed, made over certain heritable ſubjects to *Mary* and *Marion Pringles*, his two daughters, and only children, and failing of theſe, in favours of *James* and *Adam Parkers* his nephews; *Marion* the youngeſt daughter died an infant, and *Mary* the eldeſt married the ſaid *James Campbell*, to whom ſhe conveyed the whole ſubjects, (by a poſtnuptial contract), diſponed by her father, and thereafter died in minority, without iſſue. *William Hedderwick*, being likewiſe a nephew to *William Pringle* by his eldeſt ſiſter, and being by his uncle's deathbed-deed, cut out from a ſhare of the ſucceſſion to him upon the failure of his two daughters, brought an action of reduction of that deed againſt *James* and *Adam Parkers*, as done on deathbed, to his hurt and prejudice, and againſt the ſaid *James Campbell* upon the head of minority and leſion. In ſupport whereof, it was *pled*, That the law of deathbed takes place in favours of remoter heirs, as well as thoſe that are immediate heirs to the granter, unleſs ſuch deed has been ratified by a perſon having a title to quarrel it; and that, in the preſent caſe, there is no ſuch ratification of the deed in queſtion, as ought to exclude this action; ſee 18. *chap.* 7. § 2. *Book of the Reg. Maj.* 13. *chap. ſtat. Will. Craig.* 56. § 12. *Dieg.* 16th *July* 1672, *Margaret Gray*, 13th *July* 1722, Sir *John Kennedy*. It remains then to be conſidered, if *Mary* and *Marion Pringles*, the daughters of *William*, ſo far acquieſced in and homologated the deed in queſtion as to exclude the purſuer. As to which, *Marion* died an infant, and ſo could not do any deed importing an acceptance thereof; and as for *Mary*, the other daughter, ſhe never made up any title as heir to her ſiſter, to her intereſt in the ſubjects contained in her father's diſpoſition, and which remains *in hereditate* of *Marion* at this day; and the acceptance of the deed quarrelled, by *Mary* the eldeſt daughter, appearing only by a poſtnuptial contract of marriage, cannot exclude the purſuer from this action, in regard ſhe died in minority, during which time, as ſhe could not by any deed of hers ſettle any order of ſucceſſion in heritable ſubjects, neither could ſhe ſo far ratify her father's deed as to exclude any perſon who had a legal

title

title to quarrel the ſame; nay, ſhe could have revocked that acceptance, and inſiſted in a reduction of the deed in queſtion, ſince ſhe was leaſed thereby, in ſo far as ſubſtitutes were named by her father to her, to the excluſion of her neareſt heirs; much more has the purſuer, who is chiefly hurt, a right to inſiſt in the preſent action, now that the ſucceſſion is opened to him.

Anſwered for *James Campbell*, That ſuppoſing there had been no deed of the neareſt heir, either expreſt or implied, homologating and accepting of *William Pringle*'s death-bed deed, yet that no action of reduction was competent to a remote heir, when the neareſt and immediate heir was inſtitute; but as this is not the preſent caſe, it was needleſs to inſiſt upon it. Further, it was ſaid, that if either *Mary* or *Marion Pringles* accepted of the diſpoſition from their father, ſuch acceptance excluded all other remote heirs, ſuch as the purſuer, from challenging the ſame upon the head of death-bed. 2*do*, That *Marion Pringle*'s ſhare of her father's eſtate, was fully veſted in *Mary*, by her ſurvivance, without neceſſity of a ſervice, in terms of the deed quarrelled. 3*tio*, That it was *jus tertii* to the purſuer to make this objection; and laſtly, that *Mary* could not revock the acceptance, as the terms of the contract of marriage were reaſonable, and that it is certain minors may enter into marriage-contracts; and that it could not be maintained ſhe was leaſed by accepting her father's diſpoſition, and poſſeſſing the ſubjects diſponed; which excluded the purſuer from quarrelling the diſpoſition on the head of death-bed, and conſequently, from quarrelling the marriage ſettlement ſhe afterwards made with *James Campbell*. See *July* 4. 1632. *November* 22. 1664. *Margaret M'Gill*.

The Lords found, that the inſtitutes in the diſpoſition quarrelled, who were neareſt heirs at the time, having attained poſſeſſion, the ſame is not reducible at the inſtance of the purſuer a remoter heir; ana therefore found him not intitled to inſiſt in this action of reduction.

No CLIX. *December* 19. 1740.

Lord *Napier*, &c. *contra* Mr *Thomas Menzies* of *Lethem*, and his Cautioners.

Cautioners for an executor muſt have credit for debts paid by him before confirmation, notwithſtanding he is alſo heir.

LORD *Napier*, and other creditors of Sir *William Menzies* of *Gladſtanes*, brought a proceſs againſt Mr *Thomas Menzies*, eldeſt ſon and heir to Sir *William*, and who was alſo confirmed executor *qua* neareſt of kin to him, and againſt Mr *Thomas*'s cautioners in the ſeveral eiks made to the principal confirmed teſtament.

The defence offered for the cautioners was, That Mr *Thomas* had paid many moveable debts due by his father, partly before the ſeveral confirmations and eiks, and partly after, to ſome whereof he took aſſigna-

tions, and as to others diſcharges; by which the ſums in the eiks were exhauſted.

Anſwered for the purſuers, That by the act 76. Parl. 6. *Ja.* IV. the heir has the benefit of diſcuſſion againſt the executor for year and day; and after that, he is intitled to demand caution from the executor, to relieve him of moveable debts, to the extent of the free moveables; that this is the ſole foundation in law for the heir's claim of relief of moveable debts againſt the executor: That the heir, by making payment of moveable debts due by the defunct, does not become creditor to the defunct, being *eadem perſona* with him, and thereby liable to his debts of whatever kind, and by payment, he diſcharges a debt due by himſelf; but as he does not contract with the defunct, nor becomes his creditor, ſo neither is he a proper creditor upon the defunct's moveable eſtate; and from hence it is, that he has not the privileges competent to the other creditors of the defunct, *e. g.* a creditor of the defunct's may purſue a vicious intromitter, and he will be liable *in ſolidum* for payment of his debt, though far exceeding the extent of the intromiſſion, yet an heir who has paid his predeceſſors moveable debts, will have only action *in valorem* of the intromiſſion. Again, the heir's relief againſt the executor is confined to the free gear, neither can he compete with the defunct's moveable creditors; for while there are moveable debts outſtanding, there can be no free moveables, and therefore no relief to the heir; which ariſes not ſingly from this conſideration, that the heir, as ſuch, is himſelf liable to the moveable debts, but, becauſe he is no creditor of the defunct's, nor has any claim of relief upon the moveables, except in as far as they exceed the moveable debts; ſo that while there are moveable debts unſatisfied, he is not creditor upon the executry. It is indeed a different caſe where the heir is a proper creditor of the defunct's; for in ſuch a caſe, whether he confirms upon his title as creditor, or *qua* neareſt of kin, it may be argued, that his confirmation is a proper diligence, and will give him preference in competition with the other creditors to the ſubjects confirmed, however he may be perſonally liable as heir to pay their debts; but as his claim of relief is no debt due to him by the defunct, and where there are no free moveables, is no claim at all, it is therefore, with ſubmiſſion, impoſſible that he can plead this right of relief in competition with, and much leſs in excluſion of the defunct's creditors. Which doctrine, as it applies to the debts paid by Mr *Menzies* before the ſeveral confirmations and eiks, it holds *a fortiori* with reſpect to the debts paid by the heir after the confirmation; for however a confirmation may be available to the executor *quoad* the debts ſtanding in his perſon at the date of the confirmation, yet as to after acquiſitions, he can plead no compenſation, or to exhauſt the inventary thereby; it is not in the executors power, by private tranſactions with the defunct's creditors, to alter their preference, but each creditor is preferable according to the diligence done by himſelf. See *Stair*, *tit. Execut.* § 76.

Replied for the cautioners, That they having become bound for Mr *Menzies* as executor confirmed, upon the faith of his being creditor to the defunct in moveable debts, to the extent of the ſums eiked to the principal teſtament, and he being creditor for the debts he had paid for the defunct, the inventary is thereby exhauſted, at leaſt, ſo far as to procure an exoneration to the cautioners. It is true, the executor is likewiſe

likewiſe heir, and, in that character, liable to the whole debts of the defunct; and conſequently cannot plead againſt any of them, that the teſtament is exhauſted by debts already paid, ſo as to avoid judgment againſt him as heir. But the cautioners in the confirmation have no concern with him as heir, but only as executor confirmed; and therefore, if the teſtament is exhauſted, and would be found ſo, in caſe the executor had not been heir, the cautioners muſt go free. It cannot be doubted, but in the common caſe, if an executor, though confirmed as neareſt of kin, is creditor to the defunct the time of ſuch confirmation, in ſums equal to the ſubjects confirmed, he will have retention or compenſation upon account of thoſe ſums, and be thereon preferable to all the other creditors of the defunct who did not cite him within ſix months of the defunct's death. See *Stair, tit. Execut.* § 73 and 76. In the preſent caſe, Mr *Menzies* the executor muſt be conſidered intirely abſtracted from his being heir, and, in ſuch view, it cannot be doubted the teſtament would be exhauſted by the debts of the defunct, to which he had either right by aſſignation, or paid and taken diſcharges of the ſame before confirmation; and conſequently, whatever might be the operation of law in a queſtion with the executor himſelf, who is liable in the other character as heir, the cautioners muſt be intitled to the defence, to which he would be intitled, were he merely executor confirmed. The law has provided, moſt juſtly, that an executor ſhould not be exonered otherwiſe than by payments upon decreets, to avoid colluſion betwixt the executor and certain of the favourite creditors, and that it might not be in the power of the executor to prefer one creditor to another. But where the payments are made before the confirmation, there is no ground for the ſuppoſition of colluſion; for as theſe creditors to whom ſuch payments are made, might have confirmed themſelves executors-creditors, and thereby have preferred themſelves to the other creditors; ſo the payments made to them by the perſon who afterwards confirms, ſtates him in their place. According to the purſuer's argument, cautioners for an executor who is likewiſe heir to a defunct, would be univerſally liable to all the defunct's debts, though ten times more than the value of the ſubjects confirmed; and as the executor could never plead an exoneration from any of thoſe debts, ſo neither could his cautioners; which would be abſurd. An heir, no doubt, has relief againſt the executor, as to the moveable debts due by the defunct, and paid by him; and he can only plead this relief againſt the free executory, and not in competition with the creditors of the defunct. But that cannot touch the preſent caſe; for, though the heir had paid ſuch moveable debts upon law-full ſentences, his relief would not be competent againſt the executory in a queſtion with any of the defunct's creditors: But as ſuch payments would infalliably exhauſt the teſtament, as the heir was likewiſe executor confirmed, and be available to the cautioners in the confirmation; ſo muſt the payments made by him before confirmation exhauſt the teſtament, and ſo exoner the cautioners. See *Spotſwood, tit. Executor, p.* 114. and *January* 26. 1628. *Aldie.*

The Lords found that the cautioners in the eiks of Sir William's *teſtament, ought to have credit for ſuch debts as were paid by Mr* Thomas Menzies *before confirmation, and of which debts he took aſſignations and diſcharges; and that notwithſtanding Mr* Thomas Menzies *the executor was alſo heir.*

N° CLX.

No CLX. *January* 9. 1741.

Competition, *Anna Hamilton* and her Husband, with *Claud*, &c. *Hamiltons*.

Bond of proviſion to younger children, whether alterable or not.

HAMILTON of *Weſtburn*, granted an heritable bond for 5000 merks to his only daughter *Anna Hamilton*, alterable at pleaſure, and in which ſhe was infeft; thereafter, he diſponed his eſtate of *Weſtburn*, &c. to *Gabriel Hamilton* his eldeſt ſon, reſerving to himſelf only the liferent of the half thereof; but, of the ſame date with the diſpoſition, he took a bond from his ſon, wherein he obliged him to relieve his father of his debts, conform to a liſt, and likewiſe to pay the younger children an L. 1000 Sterling, by the proportions and diviſions therein mentioned, *viz.* to *Anna* 6000 merks, and to each of the younger children, the ſum therein ſpecified, in full contentation and ſatisfaction of all former proviſions made by his father to them, and all executry, portion-natural, *legitim*, or others, provided that the half of the portion of the child deceaſing before the term of payment, ſhould return to the granter, and the other half be divided amongſt the ſurviving children. Some years thereafter, he made a teſtament, whereby he varied the proportion due to *Anna* by her brother's bond, leaving her only the liferent of 2000 merks, and the fee thereof to ſuch of her children as ſhould attain the age of majority, or be married. Upon *Weſtburn*'s death, *Anna* brought a proceſs againſt her brother *Gabriel* for the 6000 merks contained in the bond to her, who being uncertain whether he ſhould pay the L. 1000 Sterling, conform to the proportions in his own bond, or according to his father's teſtament, raiſed a multiple-poinding, whereupon there enſued a competition betwixt *Anna* and the younger children.

For *Anna*, it was *pled*, That bonds of proviſion granted by a father to his children, and not delivered by him, nor regiſtered, may be cancelled, or otherwiſe altered by him at his pleaſure, becauſe he himſelf is the debtor and granter, and the obligation upon him is not compleated, but by delivery to the creditor, or to ſome other in the creditor's name; but where the obligation is taken from a third party directly to the children, or any other perſon in their name, the obligation is compleat, inducing a debt upon the granter, and a ground of credit to the party in whoſe favour the bond is conceived, which cannot be reſolved by any other perſon but the creditor, unleſs it contains a proviſion or condition *in gremio*, that it ſhall be alterable at pleaſure, which is an uſual clauſe when any ſuch thing is intended, and muſt ſurely have occurred in the preſent caſe, if the father had not reſolved, that the diſpoſition in favours of the eldeſt ſon, and his bond to the younger children which was part of the ſame tranſaction, ſhould, to the extent of the proviſions, have been the ultimate ſettlement of his means and eſtate. This bond therefore, put into the father's hands, without any condition or quality, that it ſhould be in his power to alter the ſame, as to the extent of the

childrens

childrens proviſions muſt be conſidered in his hands as cuſtodiar for his children, and in the ſame caſe, as if he had taken a bond in the name of any third party, and cauſed the perſon aſſign the ſame in favour of the children, but which bond and aſſignation the father ſtill retained; as was determined, 20. *November* 1667, *Iſobel Trotter*.

For *Claud*, and the younger ſons of *Weſtburn*, it was obſerved, That, by the law of nature and right reaſon, there is lodged in the father a power of diviſion of his effects amongſt his children, according to what he thinks each of them deſerves; and a father is never preſumed either to have reſtricted, or entirely paſſed from his power, too often neceſſary to keep children in their duty. In the next place, the younger children were no parties-contractors to this obligation; and therefore they can plead no *jus quaeſitum* in virtue of the obligation which was granted by the ſon at the deſire of the father: It cannot be *alledged*, That the ſon intended it as a gift to his younger brothers and ſiſter; it is rather to be conſidered as a price given by the ſon to the father for the eſtate then diſponed to him. So that the bond is truly the father's effects, and there is no ground to believe he ever intended to depart from his *patria poteſtas*, ſo far as to give up his power of dividing his younger childrens proviſions as he ſhould afterwards judge moſt proper, or that he deſigned to make their condition better, or tie up his hands with reſpect to them, more than if he had kept his whole eſtate to himſelf, and execute a bond of proviſion in their favours, without delivering it to them, or any for their behoof. Beſides, it is plain, from the whole tranſaction, that the proviſions were always conſidered as granted by the father; for 1*mo*, The term of payment is the firſt term after his deceaſe. 2*do*, There is a clauſe expreſsly declaring, that the ſame ſhould be in full ſatisfaction of all former proviſions made by the father. 3*tio*, As the father thought he might incline to give proviſions to his younger children during his own life, he takes the ſon obliged to pay the proviſions, either in whole or in part, at any term he ſhould think proper to demand it; and altho' there is no power of alteration reſerved in the obligation, yet, as it falls to be conſidered as a bond of proviſion granted by the father, a power of alteration is virtually implied therein; ſee 6th *July* 1717, *Roſs*, *December* 19. 1739, *Ruſſel*.

Anſwered for *Anna*, That when parties contract, if there be any article in favours of a third party, *eſt jus quaeſitum tertio*, which cannot be recalled by both contractors; but the third party may compel either of them to exhibit the contract, and thereupon the party obliged may be be compelled to perform, and whatever might be the father's after-inclinations in this caſe, he could never have compelled the ſon to give him a bond in any other terms than what he had already given him at the time of ſettling his eſtate. By the conception of the bond, the half of the portion of the deceaſing was to accreſce to the eldeſt ſon debtor in the bond; the father could not have compelled the ſon to diſcharge the benefit of this clauſe; and if he could not alter the bond with regard to his eldeſt ſon, the granter, it is not eaſy to diſcover upon what ground of law he could alter it with reſpect to the younger children, eſpecially by a deed on deathbed, in form of a teſtament; as our cuſtom extends the law of deathbed to relicts or bairns, for their legittim and portion natural, and this bond being taken in lieu thereof, re-

ſerving no power of alteration, cannot validly be altered by a teſtament executed by a father within a few days of his death.

The Lords found, That in reſpect there was no power contained in the ſon's obligation to the father to alter, that he could not alter or vary the proportions ſettled by that obligation; and therefore preferred Anna *to the ſaid* 6000 *merks, &c.; but found the ſame to be in full ſatisfaction of any former bond of proviſion granted by the father to her, and of what elſe ſhe could claim by and through her father's deceaſe.*

N° CLXI. *Eodem die.*

Doig contra *Ker.*

Objection to a teſting clauſe, that the perſons who ſign witneſſes were not ſaid to be witneſſes in the body of the writ.

IN the day-book of interlocutors, I find Lord *Drummore* reported the following objection to the teſting clauſe of an aſſignation. The clauſe run thus, In witneſs whereof, I have ſubſcribed their preſents with my hand, written by Mr *David Lyon* commiſſar of *Brechin*, the firſt day of *December* 1706 years, *William Gray* precentor in the church of *Brechin*, *William Hall* merchant in *Brechin*, and the ſaid Mr *David Lyon*, ſigned *Magdalen Livingſton*, *William Gray* witneſs, *William Hall* witneſs, *David Lyon* witneſs. It was objected as a nullity, that the perſons who ſign witneſſes were not ſaid to be witneſs in the body of the writ, but witneſs only adjected to their ſubſcriptions.

The Lords repelled the objection.

N° CLXII. *January* 24. 1741.

M'Neil contra *Campbell.*

Objection to a bill, that it bore annualrent before the date.

I Find in the day-book of interlocutors, that, on report of Lord *Kilkerran*, the Lords ſuſtained the objection to a bill, that it ſtipulate annualrent 17 days before the date.

Objection to a bill with penalty conform to law.

And of the ſame date, The Lords found, on report of Lord Juſtice Clerk, That a bill was good, tho' it bore a clauſe *with penalty conform to law*, becauſe by law, there was no penalty due.

N° CLXIII.

N° CLXIII. *February* 18. 1741.

Stewart contra *Hyſlop.*

If competent to prove by witneſſes, that a bill was accepted for money loſt at game againſt an onerous indorſee.

IN the queſtion betwixt theſe parties, the Lords found, That it was not competent to prove by witneſſes, that the bill charged on was accepted for money loſt at game, againſt an indorſee for an onerous cauſe, who was not privy to the wrong.

N° CLXIV. *February* 27. 1741.

Margaret Moubray contra *Agnes Simpſon.*

If an executor is bound to communicate an eaſe obtained from a creditor of the defunct, to the neareſt of kin confirmed executor ad omiſſa, *&c.*

Margaret Moubray being decerned executrix *ad omiſſa*, &c. as neareſt of kin to her deceaſed brother *David Moubray* tenant in *Primroſe*, brought a proceſs of compt, reckoning, and payment, againſt *Agnes Simpſon* his relict, who was decerned and confirmed executrix to him upon her contract of marriage.

The defence offered for the relict was, That *David Moubray* her huſband, was indebted, the time of his death, to Lord *Primroſe*, in a bond for above *L.* 3000 *Scots*, which ſhe having paid, and procured an aſſignation thereto, ſhe ought to have credit for the ſame.

Anſwered for the purſuer, That the defender having obtained an eaſe from Lord *Primroſe*, ſhe muſt communicate it to the purſuer, becauſe ſhe (the relict) was decerned executor the time of the tranſaction, whereby ſhe became a truſtee for behoof of all concerned, it being an undoubted principle in our law, That truſtees are bound to communicate eaſes; witneſs the caſe of tutors and curators, or truſtees for majors; and it cannot be doubted, that executors are held as truſtees for behoof of the ſeveral parties concerned. It is on that foundation that an executor confirmed cannot ſafely pay a creditor without a decreet, becauſe that would be an abuſe of an office of truſt, it being a power too high for a truſtee to prefer one creditor to another: And indeed, ſhould an executor be found not obliged to communicate eaſes, then perſons choſen to that office on account of their activity and ſkill, and who, for their trouble, are intitled by law to a third of the deads part, would have a notable opportunity of practiſing their dexterity, to the utter diſappointment of the defunct's laudable intentions, and the manifeſt diſadvantage of the neareſt of kin; conform to which it has been decided, *December* 16. 1710, Sir *James Elphingston*, *December* 1725, *Aikenhead* of *Jaw*. See likewiſe act 14. *parl.* 22. *Ja.* VI.

Replied,

Replied, That both from the general principles of law, and particular circumſtances of this caſe, the relict cannot be conſidered to have acted as a truſtee, but *tanquam quilibet*; for the tranſaction paſſed entirely betwixt Lord *Primroſe* and herſelf; no other party interveened, or had any intereſt in it; neither was it the deſign or meaning of my Lord, or relict, to profit any third party: My Lord's view was to have his money; and, as he could not have the whole without a good deal of trouble, and even a chance of loſing a part, he therefore choſe rather to give down ſomewhat, that he might have the reſt certain from the perſon to whom he gave down: And as this was my Lord's intention, ſo the relict's was ſuitable thereto; ſhe ran a conſiderable riſk. The ſubject of the executry was uncertain and precarious; moſt of it corn ſtanding on the ground; it was a great queſtion whether it would anſwer her whole debt and Lord *Primroſe*'s too; and therefore, it would have been the height of folly in her, to have paid my Lord his whole debt, and taken her chance of the uncertain product of the executry; to compenſate this hazard, the abatement was given her. Put the caſe the corn had periſhed, or greatly ſunk in its value, ſurely the purſuer would not have been obliged to have indemnified the relict of the bargain ſhe made with Lord *Primroſe*; and if ſhe would not have ſhared the loſs, there is no reaſon ſhe ſhould be admitted to any ſhare of the gain; nay, the defender was not even executor at the time of the tranſaction, for, altho' it was true ſhe was decerned preceeding that period, yet nothing followed on that decerniture; the ſame was dropt, and it was not till after the tranſaction that the decerniture was pronounced upon which the relict's confirmation proceeds. And as ſhe had made up no title at the time of the tranſaction, ſhe cannot be underſtood to be a truſtee; but even ſuppoſing the confirmation had proceeded on the firſt decerniture, yet, till confirmation, it is certain ſhe was no executrix, and therefore no truſtee. She could not have ſought payment from the debtors of the defunct, ſeeing it is the confirmation alone that gives the right of intromiſſion with the defunct's effects; the decerniture veſts nothing till the confirmation; for the decerniture is nothing elſe in the caſe of a neareſt of kin, but a declaratory judgment, that the mover of the edict is neareſt of kin, and may be let in to intromit with the defunct's effects, upon giving up inventary, and finding caution; it is not a paſſive title; and it is frequently deſerted, and never made uſe of; juſt ſo in the caſe of a creditor, it is nothing elſe but a declaratory judgment, that the mover is creditor to the defunct by the grounds of debts produced, and may be confirmed for payment of his debt; but never any body imagined that ſuch decernitures veſted any right or truſt in the movers of the edicts.

Duplied for the purſuer, That an executor decerned, and afterwards confirming, is equally liable to account for his acts and deeds relative to the defunct's effects before confirmation as after it: The confirmation muſt be drawn back to the date of the decerniture, or rather to the date of the ſerving the edict; nay, to the firſt moment that a perſon began to intromit with the defunct's effects, that perſon having afterwards confirmed; and in this caſe the widow intromitted ſoon after her huſband's death. It may be true, that, after the tranſaction, the widow got herſelf of new decerned executrix; but the reaſon of that was, becauſe my Lord *Primroſe* had formerly been decerned executor *qua* creditor:

tor: But he went no further, having aſſigned his claim to the widow, and ſhe took out a new decerniture, in order to be confirmed executrix-creditrix upon the defunct's bond to *Primroſe*, and aſſigned by his Lordſhip to her, as well as upon her contract of marriage. But ſtill it is obvious the widow was acting all along upon the plan of confirming as executrix; and if this ſhould be liſtened to, it is plain, a door would be opened to numbers of contrivances for defeating the communicating eaſes altogether.

The Lords remitted to the Commiſſaries, with this inſtruction, that the relict be obliged to communicate the eaſes to the neareſt of kin.

N° CLXV. *June* 4. 1741.

Competition betwixt *Thomas Pringle* of *Symington*, and *Aliſon Pringle*.

Rent of a Graſs-room, Whether belonging to the Heir or Executor?

Robert Pringle of *Symington* deceaſed, ſet two tacks of two graſs-rooms belonging to him, for a term of years, and by the tacks, the tenant's entry is declared to be at Whitſunday 1736, and the firſt year's tack-duty is declared payable at Martinmas 1736, and Whitſunday 1737, by equal portions, and ſo forth yearly thereafter, and *Robert Pringle* died in April 1738; whereupon this queſtion enſued, Whether the rents for crop 1737, payable at Martinmas 1737, and Whitſunday 1738, belonged wholly to *Aliſon Pringle* the executrix, or if the half belonged to *Thomas Pringle* the heir?

For the heir, it was *pled*, That the poſſeſſions of the tenants, being graſs-rooms, the legal terms, as well as the conventional, were Martinmas and Whitſunday; and that the defunct, having died before Whitſunday, tho' after the Martinmas, the rent payable for theſe poſſeſſions from Whitſunday 1737 to Whitſunday 1738, fell to be divided between his heir and executor; and that the heir had right to the rent due at Whitſunday 1738. In ſupport thereof, it was obſerved, That the law and practice of *Scotland* had eſtabliſhed certain legal terms, which are always made the rule of determining queſtions of this kind betwixt fiars and liferenters, and heirs and executors, and that without regard to the conventional terms; and therefore, the heir grounds his claim, not upon the Martinmaſs and Whitſunday, being the conventional terms, but upon their being, as he conceives, the legal ones. In corn-rooms, the term of Whitſunday is always conſidered as the firſt, and Martinmas as the laſt legal term: So that the ſurviving one, or both of theſe gives right to the whole, or half the rent of that crop. In eſtabliſhing theſe legal terms, the law has had regard both to the time of the tenant's entry, which in ſuch, is generally known to be at Martinmas, and can never be ſooner to the corn-grounds, than the ſeparation of the former crop; and therefore has made the firſt term at a half year's diſtance from the entry, and to the ſecond at a full year's di-

ſtance; and likewiſe to this, that by Whitſunday, the lands are fully ſown, and at Martinmas fully reaped, and all that year's profit fully got. From the above rule, it is conſequential, that the entry, as to graſs-rooms, is always at Whitſunday: And therefore, the next term of Martinmas, falls to be conſidered as the firſt legal term of that year, and the Whitſunday following as the laſt, which is moſt agreeable to reaſon; becauſe otherwiſe, that is, if Whitſunday was to be conſidered as the firſt legal term, it would ſuppoſe a half year's rent to be, by law, due by the tenant, at, or even before his actual entry, which, for the moſt part, is not till after the term. In ſhort, in corn-rooms, the full profits of the crop are got by Martinmas; whereas, in graſs-rooms, a continual benefit ariſes to the tenant from Whitſunday to Whitſunday; in corn-rooms, the poſſeſſion of the old tenant is determined, and that of the new one, commences at Martinmas; whereas, in graſs-rooms, the contrary holds; and therefore, not only is the difference between theſe rooms manifeſt, but likewiſe it is evident, that, by the ſame rules by which Whitſunday and Martinmas are made the legal terms in corn-rooms, Martinmas and Whitſunday ought to be theſe, with reſpect to graſs ones. What further aids the heir's plea, is, That in houſe-mails (to which the caſe of graſs-rooms has a much nearer reſemblance than to corn-lands) the terms of Whitſunday and Martinmas have never been conſidered as the legal ones; but the legal term for the firſt half-year's rent is underſtood to be Martinmas after the tenant's entry to the houſe, and the ſecond term is the Whitſunday thereafter; the reaſon of which is obvious, *viz.* That there, as in the preſent caſe, the rent is underſtood to be payable for the poſſeſſion from Whitſunday to Whitſunday: And therefore, the ſurviving the term of entry, is never underſtood to give right either to the whole or half-year's rent: But the legal term of each half-year's rent is underſtood to be that which is immediately ſubſequent to that half-years poſſeſſion; for till then no rent can be ſaid to be due: And the caſe is the ſame in graſs-rooms, the rent is paid for a continued poſſeſſion from Whitſunday to Whitſunday; and there is no reaſon to ſuppoſe *diem cedere* of any half-year's rent, until that half-year's poſſeſſion is expired.

For the executrix it was *pled*, That the diviſion of rents betwixt an heir and executor, *&c.* depends upon poſitive law, and is not to be determined by any rule of natural equity; and therefore it is, that, almoſt in every country, the rule varies; and it cannot be ſaid, that the one rule is more equitable or juſt than the other: If the rule is once fixed, the greateſt equity lies in obſerving it; becauſe, it is preſumed, that parties know it, and make their ſettlements upon the ſuppoſition of the rule of law; ſo that, in ſuch a queſtion, it is in vain to reſort to the principles of law, or the reaſons aſſigned by the doctors, they can give no aid in a queſtion of fact, *viz.* What is the rule eſtabliſhed by the law of *Scotland?* It is true, there is no ſtatute ſettling this matter, but, by cuſtom, it is firmly eſtabliſhed, that, with reſpect to all lands, there are two legal terms, Whitſunday and Martinmas: That if the heritor or liferenter ſurvive the firſt, their executor hath right to the half of that year's rent; and if they ſurvive Martinmas, to the whole; that it makes no difference what be the conventional terms of payment, and that the rule is general, without diſtinction, betwixt graſs-rooms, corn-rooms or mills, as appears from Sir *Geo. M'Kenzie*, *lib.* 2. *tit.* 9. § *ult.*

Stair,

Stair, tit. Executry, § 57. 21ſt *February* 1635, Laird of *Weſt-Nisbet*, 20th *July* 1671, *Guthrie;* and a late caſe betwixt Sir *William Johnſton* and the Marquis of *Annandale.*

But ſuppoſing the door were ſtill open for an inquiry into the reaſon of fixing the legal terms in corn-rooms, it could not be admitted, that the reaſon is that aſſigned by the heir; for it is known, that, in corn-rooms, the tenant enters to the houſes and yards at Whitſunday, before he begins to labour, and removes again at Whitſunday before his crop is ripe; and yet, after he is a year in poſſeſſion, only half a year's rent is due by him to the heritor, who dying after Whitſunday, tranſmits but half a year's rent to his executor.

It is true, the *Roman* law made but one legal term in a corn-room, namely, when the fruits were fully reaped; but ours has proceeded on different maxims, 1*ſt*, It has divided the rents of the year into two terms; and 2*dly*, It has conſidered the year and the crop as the ſame thing; and therefore, in whatever year the crop is reaped, the two terms of Whitſunday and Martinmas of that year, are the legal terms without reſpect to the tenant's entry or conventional terms: And therefore, as in corn-rooms, the tenant entering at Whitſunday, reaps no crop till Martinmas in the year following; therefore, the Whitſunday and Martinmas of the following year, are the legal terms: And in the ſame manner, in graſs-rooms, the tenant entering at Whitſunday, reaps his crop of graſs between and Martinmas the ſame years; and therefore, Whitſunday and Martinmas in the year of his entry, are the legal terms.

And as to the argument from houſe-mails, as they yield profits *quotidie*, by the *Roman* law, they were due from day to day; but, in our law, as there are two legal terms, ſo, as there is no crop, the tenant entering at Whitſunday, the firſt legal term is Martinmas, and the ſecond Whitſunday thereafter: Such is our cuſtom, and therefore, it ought to be followed in houſe rents, upon the ſame principle that Whitſunday and Martinmas are the legal terms in land-rents.

The Lords found, That the defunct, having outlived Martinmas 1737, *his executors were intitled to that whole year's rent; and therefore, that* Aliſon Pringle *has right as executrix confirmed to her Father, to the half-year's rent that was payable at Whitſunday* 1738.

N° CLXVI. *Eodem die.*

Beſſie Paterſon contra *Paterſon* of *Drygrange*, &c.

1. *Legacies fall by the Legatar's predeceaſing the Teſtator, even tho' there is annexed a general clauſe, and to their heirs and executors.* 2. *If the* jus accreſcendi *takes place amongſt thoſe to whom any thing is left equally and proportionally?*

THE deceaſed *Alexander Paterſon*, Cordiner in *Potter-row*, made a teſtamentary-deed, in which he aſſigned and diſponed to *Robert Paterſon* of *Drygrange*, and *James Shiels* brewer in *Portsburgh*, all his money

money and moveable goods, *&c.* and that as truſtees for the uſes and perſons therein deſigned, containing a clauſe that they might apply the remainder after paying his debts and legacies for their own proper uſe and behoof. Amongſt the legacies, he left a 1000 merks to *Charles Paterſon* his brother-german. "And likewiſe, he left to the ſaid *Charles* and *Beſſie* "*Paterſon* equally and proportionally betwixt them, his whole houſehold "pleniſhing, and made-work, that ſhould be in his houſe, and belong "to him the time of his deceaſe." *Charles* predeceaſed *Alexander*, and, upon *Alexander*'s death, *Beſſie* confirmed herſelf executrix *qua* neareſt of kin to *Charles*, and brought a proceſs againſt the truſtees for payment of the 1000 merks, and for delivering of the houſehold-pleniſhing, *&c.* that had been bequeathed to her and *Charles* equally and proportionally betwixt them.

As to the legacy for the 1000 merks, it was *objected* for the truſtees, that *Charles* having predeceaſed the teſtator, the legacy died with him. Neither can it weaken the objection, that the legacies are left to the ſeveral perſons therein named, and their heirs, executors, or aſſignees; becauſe this legacy is not given to *Charles Paterſon*, and his heirs and aſſignees, as if he were diſtinguiſhed from other legatars, to whom a legacy had been left to them ſingly without ſuch adjection; but there is one general clauſe prefixed to all the legacies, that the executors ſhall pay to the ſeveral perſons therein named, and their heirs or aſſignees, the reſpective ſums, and others therein mentioned, legate and bequeathed to them. 2*dly*, In ſeveral of the ſpecial legacies, there is an expreſs mutual ſubſtitution, where it was intended, that the ſame ſhould not fall by the death of ſome of the legatars. 3*dly*, Suppoſing this adjection had been made to the legacy of *Charles* ſingly, it would not have altered the caſe, as is determined by many lawyers, particularly, *Voet. tit. Quando dies legat. ced. Sect.* 1. who gives this reaſon for his opinion, That the mention of the heirs of the legatar, is underſtood only to declare expreſsly what would have been true without ſuch adjection, to wit, that the legacy being once due, or taken by the legatar, ſhould be his in perpetual property, and deſcend to his heirs, without returning after his death to the heirs of the teſtator, and that ſuch adjection is altogether ſuperfluous.

Anſwered for the purſuer, That altho' the objection is true in general, yet, in this particular caſe, the words of the ſettlement ſhow, that the teſtator had been led, *ex dilectu perſonarum*, to make a more extenſive nomination, by calling his brother, and his brothers heirs and executors, who were properly his own heirs and executors, as ſubſtitutes to the legacy, and as long as any perſon remains to whom ſuch deſcription would anſwer, the right to the legacy behoved to veſt in him: That it was quite immaterial whether the legatee's heirs or executors are called in the beginning of the deed, or if ſuch addition be made immediately after the nomination of the legatee; if they are at all called within the four corners of the ſettlement, there is a right veſted in them, which muſt ſubſiſt, were they in a queſtion with the heirs, much leſs the truſtees of the diſponers. Nay, it would have occaſioned a very unneceſſary repetition of ſtile to have called the heirs of the ſeveral legatees after any other manner; and whatever was the doctrine of the civil law upon this point, it is certain, that, by our law, *heirs* and *executors* are technical words of a legal and known ſignification; and that muſt give a right to whoever are included under that deſcription.

In

In the *next* place, it was objected for the truſtees, That, as to the legacy of the houſehold-pleniſhing, and made-work to *Charles* and *Beſſie Paterſons* equally and proportionally betwixt them; That if *Charles*'s intereſt be fallen by his death, the purſuer's claim for the whole depends upon the the queſtion, Whether the *jus accreſcendi* takes place among legatars that are *conjuncti verbis tantum?* And that it does not, is laid down by *Voet. tit. De legatis*, No. 61.

Anſwered, That the common opinion is for the purſuer, namely, that, where a particular ſubject is left in different proportions, there the right of accretion ought to take place; becauſe, *concurſium tantum partes facient*. 2*dly*, That even with reſpect to the furniture, the purſuer is called to a ſucceſſion, by a general ſubſtitution of them as heirs and executors to *Charles* the inſtitute in the legacy.

The Lords found, That Charles Paterſon *the legatee, having predeceaſed* Alexander *the teſtator, the legacy left to the ſaid* Charles, *did thereby fall; and that the purſuer* Beſſie Paterſon, *as executrix* qua *neareſt of kin decerned to the ſaid* Charles, *had no title to the legacy of a* 1000 *merks; nor to the half of the defunct's houſehold-pleniſhing and made-work, legated to the ſaid* Charles; *and further found, That the ſaid half of the houſehold-pleniſhing legated to the ſaid* Charles *did not, through his deceaſe, accreſce to the ſaid* Beſſie Paterſon.

N° CLXVII. *June* 5. 1741.

John Gray, and others, his Majeſty's Feuars in *Orkney*, againſt Sir *James Stewart* of *Burray*, &c.

Accumulatio actionum.

THESE feuars brought a proceſs againſt Sir *James*, &c. charging him particularly with exerciſing over them, by himſelf, his tenants, or ſervants, a certain authority and juriſdiction, to which he had no right; particularly, 1*mo*, For claiming a right to enter their poſſeſſions, and for breaking open doors, ſeizing their perſons and goods, confining their perſons, and detaining their goods. 2*do*, For employing officers called *Ranſelmen* to ſeize their perſons and goods. 3*tio*, For compelling them to labour his ground, and upon their diſobedience, poinding their goods. 4*to*, For compelling their ſervants, without their conſent, to leave their maſters, and to ſerve ſuch other perſons as he thinks proper. 5*to*, For aſſuming an authority to ſettle the limits betwixt his property and theirs, with a variety of other articles.

Pled for Sir *James*, and the other Defenders, That it was againſt the principles of law and juſtice, that ſo many purſuers, having no earthly connection with one another, ſhould be allowed to aſſociate themſelves, and, as it were, to club the ſeveral injuries they pretend to have received from one, or more perſons, and by throwing theſe into one libel, to rear up ſo vexatious a proſecution.

Anſwered,

Answered, It is true, that, by the common law, the accumulation of many actions into one libel, was reprobate, because of the particular forms to be observed in every action, yet that subtility does not obtain in our practice, our rule being, *quot articuli, tot libelli*; witness actions against debtors, where an 100 persons are conveened in the same libel, upon different *media*. Nor is there any rule of law for distinguishing betwixt the case of the pursuers and the defenders. It is well known, that in the court of Justiciary, the same person is accused in one libel of a variety of crimes; see the act of sederunt, 23d *November* 1711, and a late case, inhabitants of the *Canongate* against *Bailie Jack*.

Replied, Sir *George M'Kenzie* observes, It is a speciality in our law, that not only more debtors may be pursued in one summons, but that many different conclusions may be accumulated in one libel against one and the same person: A very superfluous observation, if it were law, that as many different persons may pursue as many different actions, as they have grounds of complaint against one or more persons, especially where there is not the smallest connection, either in persons or things. Is it not a great hardship to be distracted at one and the same time, with such a multiplicity of different actions, all of them thrown into one summons? How is it possible to prepare counsel upon such a variety of different points? The practice of the court of Justiciary, affords no argument; for there the King's advocate, is, properly speaking, the prosecutor, *ad vindictam publicam*; and even there, if the crimes are so many, that they cannot be easily concluded in one sederunt, it is usual for the court to divide the trial.

The Lords found this action not competent at the instance of so many pursuers; but allowed the process to proceed at the instance of any one of them; and ordained the procurators for the pursuers to make their election.

And, upon a reclaiming petition and answers, *The Lords adhered, with this qualification, that where one or more persons complain of the the same act, or acts of oppression, whereby he or they were affected, they may maintain their action upon this summons.*

N° CLXVIII. *June* 5. 1741.

Annuitants of the *York-Buildings* Company contra Mr *William Adams* Tacksman of the Baronies of *Cockenzie* and *Tranent*.

A tacksman is not bound to repair damage occasioned by any extraordinary accident, tho' he oblige himself in the lease, to put the houses in repair, and keep them so, and receives a sum certain on that account.

MR *Adams* having taken a lease of some estates belonging to the said company, on which there were several coal and salt-works, &c. being charged for payment of the rent, suspended on this ground, that he

he had ſuffered great damage by the hurricane, which happened on the night between the 13th and 14th of *January* 1739, and therefore ought to be allowed retention of as much of the rent as was neceſſary for repairing the ſubjects damaged.

Anſwered for the chargers, That tho' it may be true, that, by law, a tackſman is only tied to ordinary diligence; ſo that, when houſes on a farm are deſtroyed by thunder, lightning, or inundations, which could not be forſeen, or if forſeen, could not be prevented, the loſs muſt affect the proprietor, and not the tenants; yet, where paction to the contrary has interveened betwixt the ſetter and taker, transferring the hazard upon the tackſman, ſuch pactions ought to be obſerved, eſpecially as in ſuch caſes as now under conſideration, where the queſtion is not upon ſuch extraordinary events of thunder, lightning, *&c.* occaſioning the total deſtruction of the houſes, but a partial damage done to the houſes on the farm by ſtorms of wind, frequently occurring in this climate, tho' not ſo frequently in the ſame degree; and which therefore were probably under view of parties-contracters at the time of entering into this leaſe; ſee *l.* 15. § 2. *ff. Loc. cond. l.* 78, § 3. *ff. De contra emp.* But, in the preſent caſe, it is not left upon a preſumption; for, by a clauſe in the tack, L. 150 *Sterling* is allowed by the company to the ſuſpender for putting the houſes in repair, upon which account, he is not only bound to put them in good repair, but to leave them ſo at the expiry of the leaſe. And if, by the above clauſe, any hazard at all is underſtood to be undertaken by the ſuſpender, to be ſure, it muſt be that of winter-ſtorms, as being that which would naturally occur to both parties; and if this holds true, it will ſeem difficult to define the degree and extent of the ſtorms he is to undertake, and ſuch as he left upon the hazard of the proprietor.

Replied, By the nature of this contract, the tack-duty is the equivalent for the uſe of the ſubject ſet in tack, and the ſetter, before he can exact the tack-duty, muſt procure the tackſman poſſeſſion, and maintain him in it, 2*do*, It cannot be controverted, that a tackſman ſhould not be liable for ſuch extraordinary damages as might be occaſioned by the late unuſual and extraordinary ſtorm; ſee *l.* 28. *C. de locat. l.* 15. § 2. *ff. De loc.* ſo that, it is plain, unleſs a tackſman did, in expreſs terms, undertake to inſure the ſubjects from all damages, by which they could be attacked, either in the ordinary way, or by whatever other extraordinary accident, then the rule of law muſt take place, that the loſs and damage occaſioned by thoſe accidents muſt fall on the heritor. 3*tio*, From the clauſe in the tack, no ſuch inſurance can be deduced, for this being a *bona fide* contract, muſt be conſtructed according to the uſual meaning of parties; and as even in caſes of ambiguity, the interpretation would go againſt the ſetter, in whoſe power it was *legem contractui dare*, it is plain, the tackſman's obligation can be no further extended than to ſuch repairs as ſhould become neceſſary, through the common and uſual decay and waſte of the materials; but ſurely, in no conſtruction, can it be extended to comprehend an earthquake or hurricane, with the like of which, this climate never, or at leaſt rarely, was ever affected.

The Lords found, That the tackſman ought to have allowance for the extraordinary damages ſuſtained by the late hurricane, notwithſtanding the

the allowance of a ſum in the tack, for putting the houſes in repair, and the obligation to keep them in repair during the currency of the tack; and allowed a conjunct proof as to the condition the houſes were in when the tempeſt happened, and the extent of the damages.

N° CLXIX. *June* 9. 1741.

Sir *John Maxwell* contra Mr *Alexander M'Millan*, &c.

A ſuperiority cannot be divided without conſent of the vaſſal.

THE queſtion betwixt theſe parties reſolved in a neat point of law, to wit, whether the ſuperior of lands holding blanch, could ſplit or divide his right of ſuperiority without conſent of the vaſſal.

Sir *John* the vaſſal brought a declarator to have it found and declared, That the Superior could not, and *pled*, That it has been univerſally held by our lawyers, as well ancient as modern, that a ſuperiority is indiviſible. It is laid down as a maxim in our feudal law, *non cogitur vaſſalus, pro uno feudo duas fidelitates facere*; ſee *lib.* 2. *tit.* 55. § 1. *Cujacius* 22. *tit. Book* I. *De feudis. Craig, lib.* 2. *Dieg.* II. § 18. And that it aroſe from this principle, that, when heirs-portioners ſucceed in the heritage of the anceſtors, ſuperiorities and their caſualities are not divided, as the other particulars of the heritage, but the eldeſt portioner alone ſucceeds without any diviſion; for this very reaſon, leſt the condition of the vaſſal be rendered worſe, ſhould the ſuperiority be ſplit among ſeveral heirs-portioners. If it were allowed to multiply ſuperiors, numberleſs inconveniencies would ariſe. A ſubvaſſal is liable to many caſualities, from the accidents which befal his immediate ſuperior, his death, minority, delinquencies, *&c.* If he is ſubjected to twenty ſuperiors inſtead of one, he muſt be involved in as many queſtions with reſpect to thoſe caſualities, as he hath ſuperiors, when the different events fall out; or ſuppoſe this ſhould not happen, he muſt be at the charge of a number of different inſeftments, inſtead of one, when it is neceſſary to renew his right, or otherwiſe be ſubjected to as many proceſſes of nonentry; or, if his ſuperiors ſhould refuſe to enter him, he muſt run precepts againſt every one of them; and if they ſhould happen not to be entered themſelves, he muſt purſue declarators againſt them all before he can eſtabliſh a right to his feu. Theſe hardſhips, in many caſes, might be ſo heavy, that it would be more eligible for the vaſſal to give up his feu, than to ſubmit to them. And as a ſuperior cannot divide his ſuperiority, neither can a vaſſal voluntarily diſpone his feu without the ſuperior's conſent, either in whole or in part, ſo as to compel the ſuperior to receive the purchaſer as his vaſſal: The heir of the vaſſal may run precepts; but there is no form of proceſs known in our law, whereby a ſingular ſucceſſor can directly compel the ſuperior to enter him. The law indeed in favours of creditors, has given them a remedy, by appriſing and adjudication, to affect their debtor's eſtate; and thereupon, by legal diligence, to proceed againſt the ſuperior to enter the creditor *faciendo prout de jure*; but, from none of the ſtatutes rela-

tive

tive thereto, can any inconveniency ariſe to the ſuperior, but rather an advantage, by having an opportunity of taking the land to himſelf at a competent avail, or, in his option, a year's rent for entry of the new vaſſal; but, if any inconveniency ſhould ariſe to the ſuperior, it is believed, that even this bout-gate way of ſtating the purchaſers as creditors, ſo as to carry on adjudications, would not avail, *e. g.* If a feu-holding, for which the vaſſal paid L. 10 of feu-duty, ſhould, by divers alienations of ſmall parcels, be ſplit into 100 parts, ſo that each of the vaſſals ſhould be only obliged to pay pence for pounds, the ſuperior, upon ſhowing cauſe, would not be obliged to divide the ſuperiority, or the feu-duty attending upon it, into ſuch ſmall *reddendo*'s as would not be worth levying; but each of theſe paroels divided at firſt by the voluntary act of the vaſſal, without conſent of the ſuperior, would be ſubject *in ſolidum* to the payment of the ſuperior's feu-duty, leaving recourſe of relief to the vaſſals paying, againſt the remaining co-vaſſals in the ſame feu. And this principle is ſo ſtrongly ingrafted in our conſtitution, that, in the caſe where a ſuperiority falls to many ſingular ſucceſſors, by appriſing or otherwiſe, the vaſſal needs only take infeftment from the appriſer having the greateſt intereſt, at leaſt this doctrine is laid down by Lord *Stair*, *B.* 2. *tit.* 4. § 17.

Pled for Mr *M'Millan*, &c. the ſuperior, That anciently when feus were underſtood to be granted from the ſole favour of the ſuperior, neither the one nor the other could alienate without conſent, as is evident from *lib.* 2. *feud. tit.* 55. *pr.* § 1. tho' even then it appears, that in ſome caſes feus were diviſible. But ever ſince they became the proper ſubject of commerce, both ſuperior and vaſſal are conſidered to have very different intereſts from what was competent to them by the ancient feudal cuſtoms; and therefore, the vaſſal can either ſell or gift, not only without, but, contrary to the will of the ſuperior; and, upon the ſame principle, the ſuperior can diſpoſe of the ſuperiority, without conſent of the vaſſal: A vaſſal may alienate the whole or a part, either directly or indirectly, upon which the ſuperior muſt grant infeftment, tho' it cannot be denied, that it is prejudicial to the ſuperior to receive partial vaſſals in the fee; and if this holds, with reſpect to the vaſſal, it is not eaſy to diſcover upon what principle the ſame rule ſhould not hold with reſpect to the ſuperior, his obligation to the vaſſal not being ſtronger than the counter-obligation of the vaſſal to him: The ſuperior is underſtood to have feued out his lands at a lower rate, in reſpect of the reſerved ſuperiority; and it is known to be the caſe, that even in a blanch-holding, one can ſell his lands at a higher rate, than he can feu them out to be holden of himſelf blanch: Beſides, as a ſuperiority may be purchaſed for money, it is as much the ſuperior's eſtate, as the feu is the vaſſal's, and as the vaſſal may multiply vaſſals, why ſhould not the ſame thing be allowed to the ſuperior. To illuſtrate this, put the caſe, that the ſuperior's whole eſtate conſiſts in a ſuperiority, yielding yearly L. 1000 *per annum*, that he contracts L. 500 of debt; and that the creditors bring an adjudication, will it be ſaid, that ſuch a creditor is not under the regulations of the ſtatute 1672, that he muſt not bring a ſpecial adjudication in terms of the ſtatute? may not the debtor, complying without the rules of that act, ſave the reſt of his eſtate from being adjudged, and will not ſuch ſpecial adjudication expire and evict the part of the ſuperiority adjudged? The ſtatute makes no diſtinction, whether the debtor's eſtate conſiſts in ſuperiority of

lands feued out, or in the feu of ſuch lands. In the caſe where no purchaſer offers, the act 1681 directs the eſtate to be divided amongſt the adjudgers without diſtinction what kind of an eſtate belonged to the debtor, whether property or ſuperiority, which, upon the purſuer's plan is impracticable. Again, in the caſe of adjudgers within year and day, who is the vaſſals ſuperior, as the ſtatute has put them upon the ſame footing. In the *next* place, tho' the defender's right is a ſuperiority *quoad* the purſuer, yet *quoad* the prince, the immediate ſuperior, his right is a right of property, a feu. Now, if the purſuer's doctrine holds, where there are many intermediate ſuperiors, there can be no partial alienation by any of them, no adjudication could go againſt them in terms of the ſtatute 1672; that ſtatute could only refer to the vaſſal intitled to the natural poſſeſſion of the lands. And, with reſpect to any inconveniency that may ariſe from the multiplying charters and ſeiſins, the law does not regard that, when the relief is not augmented; no more than in the caſe where the vaſſal divides his feu amongſt many different hands, which always puts the ſuperior to more trouble in levying his feu-duty; ſee *Voet.* in his digreſſion *de feudis.* Numb. 103. *July* 30. 1678, *Luſs.*

The Lords found the ſuperior could not convey the ſuperiority to different perſons without the vaſſals conſent.

No CLXX. *June* 9. 1741.

George Cuming of *Pitulie* contra *Alexander Abercrombie* of *Tillibody*, &c.

Improbation.

IN this proceſs of improbation, the defenders inſiſted for a diligence againſt witneſſes, for proving their own and their authors immemorial poſſeſſion of the eſtate.

Anſwered for the purſuer, That the form of the action excluded the allowing any proof by witneſſes, until the chequer was cloſed by a certification; that the defender behoved to take terms to produce, unleſs he could exclude the purſuer's title by written documents: That no proof by witneſſes of any ſort could be admitted, till the production was cloſed: That no act of litiſconteſtation could be pronounced, until the production was cloſed; ſee 19th *January* 1672, Earl of *Queenſberry*, 21ſt *January* 1709, *Finzian*, 8th *July* 1738, *Ainſlie.*

Replied, The law allows this proceſs to try the rights to their predeceſſors or authors eſtates, and in that view it is reaſonable. But, on the other hand, the law has ſecured proprietors againſt the unneceſſary propaling the titles to their eſtates, and the giving an opportunity to prying people to diſcover any accidental defects that might be in them, however equitable and juſt their title was; therefore, it has always been held a good defence againſt this proceſs, and againſt all further production, if the defender inſtructed an abſolute right of property in the eſtate. 2*do*, A charter and ſeiſin, with 40 years poſſeſſion, is a ſufficient right to any eſtate in *Scotland*; if this

this were not true, no body could be ſecure from propaling the titles to their eſtate, to any perſon whoſe predeceſſors, at whatever diſtance of time, were poſſeſſed of the eſtate. 3*tio*, The defenders cannot diſcover, upon what ground this pretended form of proceſs is founded: The proceſs itſelf is not grounded on any ſtatute that has given it this form, and as it muſt be allowed a good defence againſt producing their titles, that the eſtate is their property, they muſt be allowed the opportunity of proving the ſame; for that a defence ſhould be good, and yet the party not allowed to prove it, ſeems to be a contradiction.

The Lords allowed the defenders to prove their poſſeſſion for 40 *years backward*, &c.

N° CLXXI. *June* 12. 1741.

Hamilton of *Redhouſe* contra *James Haliburton*, Bailie-Depute of the Abbey of *Holyroodhouſe*, &c.

Priviledge of the Abbey.

REDHOUSE having retired to the Abbey, information was exhibited to the Bailie, by ſome of his creditors, ſetting forth, that he had money in his pockets, but that he refuſed to pay any of his debts with it; and that he had ſaid he was reſolved to fly out of *Scotland* with it; therefore craving warrant to apprehend and ſearch *Redhouſe*, and to take what money ſhould be found in his pockets from him, the Bailie accordingly, without requiring an oath of the informers, or granting a warrant to bring *Redhouſe* before him for examination, granted the deſire of the creditors petition againſt *Redhouſe*, who had not been booked in the Bailie's books, and which warrant, having been accordingly execute, and L. 5. Sterling taken from him, he, to redreſs theſe grieveances, brought a proceſs againſt the Bailie, &*c.* for damages, in which,

The Lords found, That, in conſideration of the act of the Abbey-court in the year 1697, *and practice agreeable thereto, of putting captions in execution againſt perſons not booked, it was lawful for the Bailie of the Abbey to grant his concurrence complained of, for putting the caption in execution. And found, That, in conſideration of the ſigned information, exhibited to the defender* Haliburton, *by the other defenders, that it was lawful for* Haliburton *to grant the warrant complained of, to ſeize and ſearch the purſuer.*

No. CLXXII.

Nº CLXXII. *June* 23. 1741.

Competition, *John Kennedy* Surgeon in *Edinburgh*, with the Creditors of the deceaſed *Patrick M'Dougal* of *Crichen*.

Does the furniſhings to an heir preſerve an accompt furniſhed to the defunct from preſcription in a queſtion amongſt the defunct's creditors.

MR *Kennedy* brought a proceſs before the Sheriffs of *Edinburgh*, againſt Mr *Charles M'Dougal* Advocate, for payment of an apothecary's accompt of furniſhings of drugs to his deceaſed father, *Patrick M'Dougal* of *Crichen*. To which it was objected, that the ſame was preſcribed by the lapſe of more than three years from *Crichen*'s death.

Anſwered, That the defence was taken off by the currency of the accompt, by furniſhings made to his repreſentative Mr *Charles*.

Replied, He was only an heir *cum beneficio*, and an executor confirmed, and that theſe not being univerſal paſſive titles, the doctrine, tho' it were true, could not apply in this caſe. The Sheriffs ſuſtained the defence, and, upon a proof the furniſhing, pronounced decreet. Upon this decreet, Mr *Kennedy* craved to be ranked amongſt the perſonal creditors of *Crichen*, and to draw a ſhare of his lands and moveables. To which the other creditors renewed the objection of preſcription.

Anſwered, That it could not be denied, that a merchant's, ſurgeon's, or any other accompt of the like kind, furniſhed to a defunct, is continued by furniſhings to his repreſentative; the only queſtion that remains, is, Whether it alters the caſe, that the heir or executor is only liable to a limited effect, *viz.* to the extent of the inventaries only?

As to which, it was *obſerved*. That there could be no difference; for, if the continuance of the accompt in the perſon's own right, is ſufficient to ſave it againſt preſcription, even in a queſtion with prior competing creditors; it is plain, that a deficiency of the fund of payment falling to the heir, cannot prevent currency. The caſe is the ſame in both, an heir or executor is underſtood to be *eadem perſona* with the defunct; and therefore, where the funds do not anſwer, it can be no objection to the currency of the account, and thereupon to the admiſſion of a proof by witneſſes, more than where the funds belonging to the original debtor falls ſhort in payment to his creditors; and that, as perſonal creditors cannot plead otherwiſe than in the right of their debtor; and ſince the debtor could not object to a proof by witneſſes, on account of the currrency, ſo neither can they.

Replied for the other creditors of *Crichen*, That they could not admit the continuance of furniſhing, even to an univerſal repreſentative of a defunct, keeps the accompt with the defunct current, ſo as to ſave it from the preſcription upon the act 1579; and that it would be a very great hardſhip, if it were ſo conſtructed, the act ſays, "The creditor ſhall "have no action, except he either prove by writ, or by oath of his "party." Whereby it is certainly meant an oath of verity, for an oath of knowledge can never be meant: The perſon to whom the furniſhings were made, muſt know both that the goods were furniſhed, and that they

they were not paid, which is a proper oath of verity; but his repreſentative, tho' it may conſiſt with his knowledge, that the goods were furniſhed (which is in ſo far ſwearing to the verity), yet, when he ſwears that they were not paid, that is no other than an oath of opinion or credulity, ſo that it is impoſſible to connect the accompt of the defunct, and the accompt of the repreſentatives, as one accompt current in the ſenſe of this law. If it were otherwiſe, numberleſs inconveniencies would enſue: a man has perhaps paid his accompts, and dies ſuddenly; but his repreſentatives continues to be furniſhed from the ſame perſon, and dies, perhaps at the diſtance of a dozen of years, his heir may be purſued within three years from the laſt article of his accompt, which is perhaps the day of his death, for the accompt of the remote predeceſſor. This ſurely was never the deſign of the law: All our negative preſcriptions operate as ſo many preſumed diſcharges; and it is for that reaſon, that the law allows this defence to be taken off by oath of party; that is, by the oaths of ſuch parties as can be able, and therefore are obliged to ſwear from their proper knowledge to this negative, which takes off the preſumption, *viz.* that the debt is not paid.

As to the currency of the accompt, it is hard to aſſign a period when a man's accompt cloſes, if it does not cloſe by his death; an heir, it is true, is, by fiction *eadem perſona*, &c. but it would be carrying the fiction a great deal too far, to make furniſhings to the heir, be deemed furniſhings to the defunct; when a man dies, his creditors ceaſe to follow his faith; neither do they follow the faith of his ſucceſſor for prior contractions; for theſe the law will force him to anſwer, whether he will or not: and as to furniſhings to himſelf, there muſt be a new accompt inſtituted, becauſe there is a new faith followed. Further, no man furniſhes to another, becauſe he has a title to repreſent his predeceſſor; for the creditor cannot know, whether he will chuſe to repreſent by actual addition, or imixtion, or not. But ſuppoſing Mr *Kennedy*'s doctrine true, it will never hold in the caſe of partial paſſive titles, ſubjecting the repreſentatives only *in valorem*; and the reaſon is, becauſe the rule *heres eſt eadem*, &c. only applies to the caſe of univerſal ſucceſſions.

The Lords ſuſtained the objection of preſcription.

N° CLXXXIII. *June* 23. 1741.

Procurator-Fiſcal of the Juſtice of Peace for the Shire of *Eaſt Lothian* contra *James Seaton*, &c.

Juriſdiction of Juſtices of the Peace with reſpect to the demoliſhing Pidgeon-houſes.

THIS fiſcal brought an action upon the 19th act, 22d Parl. *Ja.* VI. before the ſaid Juſtices of the Peace, againſt ſeveral perſons, wherein he inſiſted they ſhould be ordained to demoliſh their dovecoats, in reſpect they were not intitled by law to keep them; which proceſs, he afterwards advocate.

Objected for the defenders, That the fiſcal, who has his commiſſion from the juſtices, has no title to proſecute any actions, but ſuch as were competent to be judged by the juſtices of peace themſelves: For though ſome actions may be competent before the juſtice of peace court, where the fiſcal cannot be the purſuer, yet it muſt be true, that the fiſcal can purſue no action where the juſtices cannot judge; his powers are derived from them, and conſequently cannot intitle him to proſecute any thing which may not be brought before that court in the firſt inſtance; ſee the acts 1617, 1661, and act 1609, intitled, *Act anent the Commiſſioners and Juſtices of the Peace.*

Anſwered, Tho' this caſe is not expreſsly mentioned in the inſtructions to the juſtices; yet, from the nature of the thing, it appears plainly to be ſubject to their juriſdiction, the act upon which this proſecution is founded, is a public law, concerning the policy of the country; and as the juſtices juriſdiction extends to all matters relating to the policy of the country, it would be unreaſonable to limit their powers in the preſent queſtion. Their juriſdiction, in common with moſt other judges, is determined by cuſtom, as much as by expreſs ſtatutes; and therefore, where caſes ſimilar to thoſe particularly laid down in their inſtructions occur, no good reaſon can be aſſigned why thoſe ſhould not be ſubject to their determination. Their powers extend to encroachments on the high-roads, deſtroyers of red fiſh in forbidden times, tranſgreſſions in caſes of muir-burn, and to ſuch as uſe the privilege of hunting without being duly qualified. Neither is this a queſtion of property. The houſe in which pidgeons are contained, is, no doubt, a ſubject of property, and may very aptly be called an heritable right; but then, the privilege of employing that houſe to a particular uſe, or to an uſe contrary to public law, never was called ſuch.

The Lords found, That no action upon the act of parliament anent pidgeon-houſes, of which the parties had been ſo long in poſſeſſion as years, was competent before the juſtices of peace; and therefore diſmiſſed this proceſs.

N° CLXXIV. *July* 3. 1741.

Andrew Hunter of *Lochrinny* contra *Elizabeth* and *Margaret Hunters.*

Adjudication.

IN the proceſs of declarator of expiry of the legal of three adjudications, purſued at the inſtance of *Lochrinny* againſt the defenders, it was *objected*, That the ſpecial charge, whereon one of them was founded, is blank in the lands, and conſequently null, the defenders father not being infeft at the time.

Anſwered, That altho' the defenders in that adjudication, were only in a ſtate of apparency the time of leading thereof; yet, as he was afterwards infeft in the lands of *Greenan*, one of the three parcels adjudged,

ged, his poſterior infeftment muſt accreſce, and validate the adjudication as to that parcel.

Replied, That an adjudication only taking the right out of the perſon of their father, ſuch as he had it at the time of the adjudication, which, in this caſe, was none at all but a mere right of apparency: His poſterior infeftment can never accreſce, no more than an adjudication could be made to carry an eſtate purchaſed after the date thereof; ſee 11th *January* 1699, *Dundas* obſerved by *Fountainhall*.

Duplied for the purſuer, The ſimile, tho' juſt, does not apply: For here the lands of *Greenan* were a part of the heritage that belonged to the common debtor, and which fell under his right of apparency to his father; and it being inſtructed that he was infeft in theſe lands, though after the date of the adjudication, ſuch infeftment muſt accreſce to the adjudger. And as to the objection, that the lands are not filled up in the ſpecial charge, it is believed he cannot be in a worſe ſituation, than if no ſuch charge had been produced, the decreet narrating it to be produced, and ſo a complete diligence by itſelf, and the purſuer is not obliged, *poſt tantum temporis*, to produce the letters of ſpecial charge.

The Lords ſuſtained the nullity, in ſo far as to void the adjudication as to the accumulations and expiry of the legal, reſerving to be heard, whether it is void in totum.

N° CLXXV. *July* 10. 1741.

Andrew Forbes Merchant in *Rotterdam* contra *Abel Fonnereau*.

Indorſation, how far property is thereby transferred.

THE ſaid *Andrew Forbes* had frequent intercourſe and dealings with his Brother *Alexander Forbes* merchant in *London*, in the way of their buſineſs, and as *Andrew*'s buſineſs made it neceſſary for him to have a correſpondent in *London*, to anſwer the draughts he had occaſion to make from time to time on account of his being in advance for his employers: So he was in uſe of drawing or indorſing, to his brother *Alexander*, the bills of his *Scots* employers, and making draughts on him, payable to ſuch other perſons as he had occaſion to be debtor to in the way of his buſineſs. *Alexander* died in *May* 1740; and, in purſuance of the way of dealing betwixt the two brothers, *Andrew* had indorſed to *Alexander* bills to a pretty conſiderable extent, ſome of which he had recovered payment of, but conſiderable part of them were outſtanding the time of his death. They generally bore to be drawn or indorſed to *Alexander*, for value in accompt with *Andrew*; others ſimply for value. *Andrew* drew on his brother *Alexander* for ſums equivalent to the bills he had remitted to him, the balance on either ſide coming pretty near. All theſe draughts *Alexander* accepted, and conſiderable part of them were duly paid; but *Alexander* dying, and leaving his affairs in confuſion, great part of *Andrew*'s draughts on his brother *Alexander*, were returned back on *Andrew*, which occaſioned a conſiderable balance to come out on *Andrew*'s Side. *Abel Fonnereau* being creditor

to

to *Alexander*, obtained himſelf confirmed executor-creditor, and gave up in inventary thoſe *Scots* bills which were drawn and indorſed by *Andrew*. Whereupon *Andrew* raiſed a proceſs for having it declared, That the property of thoſe bills ſtill remained with him, and they ought either to be delivered up, or the money made forthcoming, where payment has been recovered by *Abel Fonnereau*. And the queſtion betwixt the parties was, Whether theſe bills drawn or indorſed by *Andrew*, payable to his brother, and bearing generally to be for value in accompt, did remain the property of *Andrew*, notwithſtanding of *Alexander*'s having accepted draughts for equivalent ſums? Or if by their being originally payable or indorſed to *Alexander*, and his after accepting of equivalent draughts by *Andrew* to his creditors, they became abſolutely the property of *Alexander*, though, in the event, ſome of *Alexander*'s acceptances to *Andrew* had not been paid.

Pled for the purſuer, That tho' the indorſation of bills purchaſed for value, or where the intendment of ſuch indorſation appears to have been to transfer the property, as is the common caſe amongſt perſons reſiding in the ſame country, the ſimple indorſation may have the effect to veſt the property of ſuch bills in the indorſee; yet, in tranſactions of this nature, betwixt a merchant abroad, tranſmitting bills to his factor or correſpondent here, by indorſements for value in accompt, ſuch indorſements can never have the effect to transfer the property; becauſe, in ſuch caſe, it is undeniably evident from the *res geſta*, and particularly from thoſe words, *value in accompt*, that the indorſee is no purchaſer of theſe bills: That he is but a hand, employed by the merchant abroad, to receive the money, for which he was to be accountable; ſo that, however ſuch bills were thereby nominally veſted in the factor or correſpondent, whereby he might be enabled to uplift the money, or diſcharge the bills for the behoof of his conſtituent; yet ſo long as the money was not received, and the bills themſelves outſtanding, they continued to be the property of the indorſer, upon his riſk and account. If the ſimple indorſation under theſe circumſtances, did *eo ipſo* transfer the property of the bills, the indorſee would, from the moment of ſuch indorſation, become liable to the indorſer for the equivalent ſums; which is manifeſtly too abſurd to be maintained, more eſpecially, that, from the courſe of their correſpondence, and former accompt, as balanced and ſtated in *Alexander*'s books, it appears, he did not conſider theſe bills as his own property, but as the property of his brother *Andrew*; ſee 9th *June* 1669, *Street*; and the late caſe betwixt Mr *Alexander Arbuthnot* and *George Ainſlie*. Therefore, taking it for granted, that the property of theſe bills were not transferred to *Alexander*, it is inconceivable how *Alexander*'s accepting the bills, which his brother *Andrew* drew upon him a few days before his death, ſhould, as it were, by the force of magic, from that moment, transfer to *Alexander* the property of the bills in queſtion, when theſe very bills were forthwith proteſted for not payment, and returned upon *Andrew*, who was thereby put under a neceſſity to retire and pay his own draughts. Nay, it may be doubted, ſuppoſing *Alexander* had actually paid thoſe bills which his brother drew upon him, if thereby the property of the bills in queſtion would have been abſolutely transferred to *Alexander*; becauſe, however he might have been intitled to have applied the proceeds of the *Scots* bills for his own reimburſement, the property of the bills, ſo long as they were unpaid,

paid, muſt ſtill have remained with *Andrew*, and if any of the debtors had failed, he, and not *Alexander*, muſt have ſuſtained the loſs.

Pled for the defender, That he had no occaſion to argue, how far an indorſation, bearing value to accompt, and where the indorſee is to account to the indorſer for the ſum in the bill when recovered; whether that would ſtate the property of the bill in the indorſee, which, perhaps is not ſo clear a point; but what he inſiſts upon is, that *Andrew* having drawn or indorſed bills to him, and afterwards having made draughts on him for equivalent ſums, that, from the time *Alexander* accepted of the draughts on him, he became full proprietor of thoſe bills which had been drawn or indorſed by his brother payable to him. For even ſuppoſing, as the purſuer ſtates it, that theſe indorſations had been to *Alexander* only as factor, and that the deſign was to recover the money, and be accountable for it to his conſtituent; yet, whenever *Andrew* came to draw upon *Alexander* for an equivalent ſum, the accepting of that draught was an accounting to *Andrew* for the effects he had in his hands: He ceaſed then to be debtor to *Andrew*, and became debtor to the party to whom *Andrew*'s draughts were made payable; conſequently as the onerous cauſe of his acceptance, the effects of *Andrew*, he had then in his hands, became abſolutely his own property. If a contrary doctrine were true, this manifeſt abſurdity would follow, the factor would be bound to make furthcoming the effects that had been put into his hands; he would ſtand abſolutely bound to his employer's creditors, and, for his reimburſement, would only have a *pari paſſu* preference on theſe very ſubjects, in contemplation, and for ſatisfaction of which, he had accepted the draughts. Perhaps *Alexander* was not obliged to accept of the draughts on him; for, until ſuch time as he had recovered payment of the bills indorſed to him, he had ſtrictly no value of his brother's in his hands. But, if he did accept, it was an accounting for the ſubject of the bills indorſed to him before payment; and thoſe bills which he formerly held for value in accompt, he now had for a juſt and onerous cauſe, conſequently were as much his property as bills could be of any other onerous indorſee. *Laſtly*, From the extract of the purſuer's books, it appears he looked upon thoſe bills, as become his brother's property by the indorſation; for, he debits *Alexander* with all the bills indorſed; gives him credit for the whole draughts made by *Andrew* upon *Alexander*, and ſtates the balance as ariſing from part of thoſe draughts being returned proteſted, not ariſing from *Alexander*'s having failed to account for any of the bills indorſed to him: And this the defender thinks is a ſtronger argument againſt the purſuer, than any he can draw from the ſtating of the accompts by *Alexander*.

The Lords found Andrew Forbes *purſuer, preferable to* Abel Fonnereau *executor-creditor of the deceaſed* Alexander Forbes, *with reſpect to the* Scots *bills made payable to* Alexander, *or indorſed to him for value in accompt, except in ſo far as the executor-creditor ſhall make appear that* Alexander Forbes, *either by payment, or his acceptance of bills drawn on him by his brother* Andrew, *ſtands creditor to* Andrew.

No CLXXVI. *July* 15. 1741.

Captain *Gavin Cleland* contra *James Hamilton* Surgeon in *Glaſgow*, &c.

Uſury.

GAVIN CLELAND granted a bond to *James Hamilton* of *Newton.* for 300 merks, the annualrents of which he paid for many years; but thereafter he brought a reduction thereof, on the head of uſury, and the *ſpecies facti* he condeſcended on, was the receiving annualrents before-hand, or before it was due: For verifying of which, he produced an holograph diſcharge of annualrents of *James Hamilton* the creditor, of date the 31ſt *January* 1734, diſcharging all annualrents due on the bond till Lambmas thereafter; and after the creditor's deceaſe, he awakened the ſame againſt his executors.

The defences for the executors were, That the ſpecies of uſury complained of, was not comprehended in the 28th act, 23d Parl. *Ja.* VI. by which the only cuſtom intended to be reſtrained, was the taking annualrent at the time of lending the money, which it ſeems was then an ordinary practice, and was no doubt very oppreſſive to the debtor, but which ought not to be extended further. Beſides, the *term of payment*, mentioned in the act, may be very properly underſtood, only with reſpect to the term of payment of the bond itſelf. Further, it is impoſſible to ſuppoſe there could be any uſurious intention in the preſent caſe, as the profits ariſing to the creditor, from receiving before-hand, 7 merks and a half *Scots* (intereſt of one term) does not exceed three half-pence, for the benefit of which no perſon ſhould be ſuppoſed ſo mad or fooliſh as to riſk the forfeiting his debt. Beſides, it is probable, there has been ſome miſtake in the date, as it is uſual in the firſt month of a year, to continue the number of the year, which is paſt; ſo that the receipt has truly been of date 1735.

Anſwered, The act intended to prevent the oppreſſion of ſtraitned debtors, by anticipating the payment of annualrents before the ſame fall due; whereby, as the debtor wants the uſe of his money to the ſaid term, ſo the uſurer, by lending it out, gets in effect more annualrent than was pactioned by the bond: And whether it happens at the time of the loan, or term of payment of the bond, but before the term of payment of the annualrent exacted, is one and the ſame thing in the eye of the law; and the defenders miſtake the meaning of the words of the act, *diſcharging the craving or receiving of annualrents of the ſum lent, until the term of payment appointed by the bonds*; for it is not the term of payment of the capital that the act ſpeaks of, but the term of payment of the annualrents. And, by the 222d act, Parl. 14. *Ja.* VI. whether the gain be great or ſmall, receivers ſhall be deemed uſurers.

As to the obſervation with reſpect to the date, it was *anſwered*, That tho' it may be common in the firſt days of a new year, to continue the date of the former; yet this rarely happens ſo far down as the very laſt day of *January*; beſides, the particular ſtile of this diſcharge, ſhows plainly that this could not be the caſe.

The

The Lords found there was no ſufficient evidence of uſury, ſo as to annul the bond in this caſe.

No CLXXVII. *July* 17. 1741.

Alexander Brown Writer in *Ardrieton* contra *Andrew Crawfurd* of *Lochcoat*.

The verity of a holograph note may be proved even after 20 *years by the defender's oath, tho' an heir.*

James Crawfurd then of *Lochcoat*, the defender's father, granted a note to Mr *John Brown* the purſuer's father, of date the 5th of *July* 1709, in theſe terms: Received from Mr *John Brown*, fifteen pounds *Sterling*, which I oblige me to repay, as witneſs my hand, *&c.* Upon this note, *Alexander Brown* brought a proceſs againſt *Andrew Crawfurd* for payment.

At *firſt*, the defender *pled*, *That the note was null*, upon which the purſuer offered to prove, by the defender's oath, the ſame was holograph of his father; which he failing to do, was held as confeſſed.

Thereafter the defender *pled*, That, admitting it to be holograph, it was preſcribed, being more than 20 years ſince the ſame was granted.

Anſwered for the purſuer, That, he offered to prove, by the defender's oath, that the ſubſcription was his father's, at leaſt that he had no juſt reaſon to deny the ſame.

Replied, The quality of proving the ſubſcription by the defender's oath, in the act 1669, only concerns the caſe where the ſubſcriber of the holograph writ is purſued, The words of the ſtatute are, "Holograph bonds, "and ſubſcriptions in compt-books, without witneſſes, not being purſued "for within 20 years ſhall preſcribe, in all time thereafter; except "the purſuer offer to prove, by the defender's oath, the verity of the "ſaid holograph bond and letters." And Sir *George M'Kenzie*, in his obſervations on this act, ſays, That holograph deeds, not purſued on within 20 years, are only to be proven by the oath of the ſubſcriber, an authority which muſt have great weight in explaining the act, as it would ſeem he was preſent in that parliament. Beſides, it is obvious, the intent of the law was to eſtabliſh a preſcription to all ſuch incomplete writs, as, by their nature, were ſuppoſed not to be permanent, and underſtood by the parties contracting, to endure for a ſhort time; ſo that it is ſubmitted, whether or not the meaning of the words of the ſtatute, to wit, the verity of holograph bonds and letters, do mean the exiſtence of the debt, or that the ſame is reſting owing, and not to the verity of the writ, in ſo far as it was a writ: And ſurely it would be altogether unneceſſary to refer to a party's oath the verity of a holograph bond, ſeeing that could be done better *comparatione literarum*, which would be more certain evidence than a defender's oath, unleſs he had ſome particular occaſion of knowing the fact.

It was likewiſe *objected*, That neither the debtor nor creditor was deſigned.

Duplied,

Duplied for the purſuer, That the reaſon why the verity of holograph writs after the lapſe of 20 years muſt be proved by the defender's oath only, in order to ſubject him, is that the proof of a writ's being holograph is difficult and uncertain by compariſon of hand-writing; and to put an end to ſuch uncertainty at ſuch diſtance of time, the law has required a proof of the verity of the deed by the defender's oath, and rejected all other manner of proof. That where the law makes no diſtinction, neither ought the judges in the interpretation thereof. It mentions *the defender*, without limiting to the ſubſcriber of the writ, conſequently it muſt be applied accordingly without diſtinction; more eſpecially, ſince it is apparent, that the preſumed reaſon of the law militates in the one caſe as well as the other; and ſo it was decided in the caſe betwixt the Earl of *Dundonald* and *Graham* of *Kilmardinny*. With reſpect to the obſervation, that neither debtor nor creditor is deſigned in the note, there is nothing in it, as the purſuer got the note from his mother, who is general diſponee from his father; and therefore, being found amongſt his father's papers, who bore the name of the creditor in the note, he muſt be taken to be creditor. Neither is there any law that requires the deſignation of debtor or creditor in writs: but when it is offered to be proven, that this is his father's ſubſcription, this objection muſt be fully removed.

The Lords found, That the verity of the writ in queſtion was probable by the defender's oath.

No CLXXVIII. *July* 31. 1741.

Competition betwixt the Creditors of *James Lockhart* and *Anna Lockhart*.

Clauſe in a contract of marriage, Whether importing that the children are creditors, or only heirs of proviſion?

James Lockhart Tenant in *Brunſton*, in his contract of marriage with *Margaret Montgomery* his ſecond ſpouſe, provided 2000 merks to the children of that marriage, in the following terms, *ſcil.* "He contracts "and provides to himſelf, and ſaid ſpouſe, or longeſt liver, during their "life-time, the yearly annualrent of the ſum of 2000 merks, and the fee "thereof to the bairns of the marriage which ſhall happen to be pro-"create betwixt them.

Upon *James*'s deceaſe, *Anna Lockhart*, the only child of that marriage, confirmed herſelf executor-creditor to her father, for payment of the ſaid 2000 merks; whereupon a competition enſued betwixt her and her father's creditors.

For the creditors it was *urged*, That, by the conception of the clauſe, *Anna Lockhart* could only be conſidered as an heir of proviſion, ſeeing her father does not become bound to pay to the children of the marriage 2000 merks, but only to provide and ſecure the fee of the ſaid ſum to the children of the marriage; ſo it muſt be deemed the ſame, as if he had

had taken a bond to himſelf in liferent, and the children *naſcituri* in fee; in which caſe the children that after exiſted could only take the fee as heirs of proviſion to the father, in whoſe perſon the fee, of neceſſity, behoved to be lodged, though it is termed only a liferent, which, as the lawyers ſpeak, behooved to be underſtood, *uſusfructus cauſalis*, in reality a fee, though nominally termed a liferent. 2*do*, This proviſion was not exigible in the father's lifetime, or whereof the term of payment could exiſt in his life: in which caſe alone proviſions to children *naſcituri*, are regarded in law to create the children that ſupervene proper creditors, ſo as to compete with other onerous creditors upon their diligence. See the caſe of the Creditors of *Eaſter Ogle*, 24th *January*, 1724.

For *Anna Lockhart* it was *urged*, That, by the words of the proviſion, ſhe could not be conſidered as an heir of proviſion, ſeeing her father does, *per verba de preſenti*, provide the fee of the ſaid ſum to the bairns of the marriage; plainly avoiding the words commonly uſed, *heirs of the marriage:* That the terms of every contract muſt be conſidered upon its own footing; and here the proviſion is not in the common ſtile, to the father in liferent, and children *naſcituri* in fee; but it is anxiouſly provided, That the fee ſhould be directly in the children, and nothing but the bare annualrent of the ſum in the parents during their life, which as he could, ſo he has done in this caſe; whereby, on *Anna Lockhart*'s exiſtence, ſhe became a proper onerous creditor in the fee of that ſum. See 4th *February* 1681, *Thomſon*, Sir *James Stewart's Anſwer's*, p. 117.

The Lords found, That Anna Lockhart *could not compete with the other creditors, upon the proviſion of* 2000 *merks.*

N° CLXXIX. November 6. 1741.

James Blair of *Ardblair* contra *Helen Hunter*, Relict of *Patrick Johnſton* of *Gormoch*, &c.

Warrandice.

The ſaid *James Blair*'s father did, in the year 1683, purchaſe the lands of *Hatton* of *Rattery* from *Patrick Johnſton* of *Gormoch*; and as his right thereto was only a gift of forfeiture (which was thereafter reſcinded) Mr *Blair* did not think himſelf ſafe to rely on *Gormoch*'s title to to the lands, or his perſonal warrandice, but he obtained real warrandice, for ſecurity of his purchaſe: And accordingly *Gormoch* diſpones to Mr *Blair* the lands of *Hatton*, &c. as for the principal, and the *Mains* of *Gormoch*, &c. and that in ſpecial clauſe of warrandice, and relief, and ſecurity of the principal lands. The diſpoſitive clauſe (ſo far as concerns this queſtion) was in the following terms: "Swa that it ſhall "happen, the ſaid lands of *Hatton*, principally diſponed, to be evicted, in "haill or in part, from the ſaid *James Blair*, &c. at the inſtance of any "perſon, or that they be any ways troubled, *&c.* in the peaceable bruik-"ing or enjoying the ſame: then, and in that caſe, the ſaid *James*

" *Blair*, &c. ſhall have, immediately thereafter, full and free power, re-
" greſs and ingreſs to the ſaid lands of *Gormoch*, &c. in real warrandice,
" as ſaid is, and to the intromitting with, and uplifting the mails,
" farms, and duties thereof; at leaſt, to ſa miekle of the ſame as ſhall
" effeir and correſpond to the ſaid eviction or diſtreſs, *pro rata*."
The lands of *Hatton* were evicted, by decreet, in the 1722: And, after ſome other litigation, the ſaid *James Blair* brought a declarator of recourſe againſt the heirs and creditors of *Gormoch* his author, for aſcertaining the damages he had ſuſtained through the eviction; for declaring, that he had recourſe upon the warrandice lands for thoſe damages; and that the warrandice-lands were really affected with the value of his damages.

In the courſe of this proceſs, he proved the rent of the evicted lands at the date of the eviction, the value thereof, and that he had been excluded from the poſſeſſion of the principal lands from the year 1722; and therefore, that the loſs of thoſe *interim* rents, as a damage ariſing from the eviction, is really ſecured upon the warrandice-lands; and in ſupport thereof, *pled*, That perſonal warrandice, in all onerous contracts, both by the Roman law and ours, has always been underſtood, not only to extend to the value or price of the ſubject evicted, but to the whole damage ariſing from the eviction: And if this holds with reſpect to the warrandice implied in a ſale, when it is not expreſſed, with what reaſon can it be ſaid, that, where lands are diſponed in real warrandice in a ſale, the warrandice has a more narrow and different ſignification? That a real ſecurity is thereby intended for the value of the ſubject evicted only, and not for the whole damage ariſing from the eviction? For what good reaſon ſhould the legal conſtruction of warrandice be different in real warrandice from what it is in perſonal? That in the one it ſhould ſignify a ſecurity for the value of the ſubject evicted, and in the other, whether warrandice be expreſſed or implied, ſhould import an obligation to refund the purchaſer's damage and intereſt. And if this is ſo, that a purchaſer's damage is really ſecured upon the warrandice-lands, it is impoſſible that an infeftment of warrandice can be an infeftment of property, intitling the purchaſer, immediately upon the eviction, to the property of the warrandice-lands, equal in value to the lands evicted? An infeftment for ſecurity of a claim of damage and intereſt, is the moſt different thing that can be figured from a claim of property: It is an infeftment for a ſum illiquid indeed, but which muſt be liquidate. The regreſs that is competent in excambion, ſtands upon very different principles, and governed by very different rules from recourſe: In an excambion, in caſe of eviction, the party recurs to his own lands, and the property reverts to him, as if the excambion had never happened, without any proceſs of liquidation; and that his regreſs cannot be barred, tho' the purchaſer ſhould offer to make good his damages ariſing from the eviction; becauſe, by the eviction, the contract is reſolved, and, conſequently, the purchaſer's right to the lands: But, in recourſe upon real warrandice, as the ſeller is only bound to make good the purchaſer's damage and intereſt; if he is willing to pay up this damage when it is liquidate, he fulfills his obligation, and extinguiſhes as the perſonal, ſo the real warrandice. Again, ſuppoſe the eviction not to be any part of the property, but of a ſum of money, which was a real burden upon the lands; in ſuch a caſe, the real warrandice can be no infeftment of property,

perty, and, conſequently, the recourſe on the real warrandice muſt be but a ſecurity for the ſum. Or, ſuppoſe the real warrandice to be granted on a mill, or upon the teinds of other mens lands, and that the ſubject evicted is a land eſtate; if the real warrandice is a conditional infeftment of property, of a ſubject yielding as much rent as the lands evicted; then, upon eviction, recourſe will only be had to mill-rent, worth but ten or twelve years purchaſe, or to teinds worth but ſix or nine years purchaſe, in place of lands worth twenty-four. Again, ſuppoſe the ſubject affected with the real warrandice, is alſo affected with a preferable liferent, and that, when the eviction happens, the liferent excludes the recourſe for twenty or thirty years: Surely it is not to be maintained, That, becauſe of the liferent, the real warrandice was intended to be reſtricted: That the purchaſer has all that was intended by his real warrandice, when, twenty or thirty years after the eviction, he gets lands of equal rent with thoſe evicted ſo many years before; and yet this would be the caſe, if an infeftment of warrandice were a conditional infeftment of property. But as warrandice implies a recourſe for the damage ariſing from the eviction, that, as the value of the ſubject evicted, ſo the want of the rents through the fact of the ſeller, would come under the warrandice, and would be really ſecured by the infeftment of warrandice.

Anſwered for the defenders, It is true, that both by the Roman law and ours, perſonal warrandice is implied in all onerous contracts, which imports an obligation in caſe of eviction, not only to pay the value of the ſubject evicted, as it was the time of the bargain, but likewiſe every damage that has ariſen to the purchaſer, by means of that eviction at the time thereof; but there is no ground in law for extending the the action, ſo as to comprehend any damage that enſues after that has happened; ſo that whether the ſubject increaſe or diminiſh after the eviction, the claim upon the warrandice remains the ſame, as is evident from many authorities both in the Roman law and our own. If then, damages ſuſtained through an eviction, are to be eſtimated according as things ſtand at that time, then the purſuer would have no right to inſiſt, even upon his perſonal warrandice, were he in an action againſt the heir of his author for the rents of the evicted lands, for any years that have run ſince the eviction; ſeeing theſe rents cannot be ſaid to have been evicted from him, and ſince that damage had not ariſen at that time; and far leſs can he, in the preſent proceſs, have recourſe for the value of theſe rents upon the warrandice-lands. It is another queſtion, how far the purſuer has an action againſt the heir of his author for the intereſt of the amount of the damage ſuſtained by his father at the time of the eviction; but whatever may be in that, it is ſufficient to obſerve, that the purſuer is not at preſent in a proceſs for recovery of theſe annualrents, as he is only inſiſting for the value of the rents of the lands, which may be either more or leſs than the annualrents of that ſum; and therefore, whatever claim he may have to the annualrent of that money, that claim will not ſupport his demand of the value of the rents, were the queſtion even with the heir of the lands, much leſs when it is with ſingular ſucceſſors.

In the *next* place, ſuppoſing perſonal warrandice were as extenſive as the purſuer would have it, no conſequence can be drawn from thence, that real warrandice is equally wide; for, where one perſon grants and another

another accepts a right to lands with real warrandice, it is not the intention of parties to grant or accept thereof as a pledge or acceſſory ſecurity to the perſonal obligement; but only, that, in caſe of eviction, the right of the warrandice-lands ſhould become abſolute and irredeemable: Whence it follows, that, after an eviction, the perſon from whom the lands are evicted can have no claim for the value of the rents of the land evicted, ſince he, as proprietor, has a right to theſe of the warrandice-lands from that time. And the only difference there is betwixt a regreſs upon an excambion and recourſe upon warrandice-lands, in caſe of a ſale, is, that the condition is expreſſed in the one, and implied in the other infeftment; and theſe two contracts agree likewiſe thus far, that there is a perſonal warrandice competent in an excambion, as well as in a ſale; the one being an onerous contract, as well as the other; which ſhews, that there is no inconſiſtency in a perſonal warrandice, being more extenſive than that which is real: For, though a perſon from whom a part of the lands given him in excambion has been evicted, has an action for all the damage he has ſuſtained through that eviction againſt his author; yet, it cannot be ſaid, that that whole damage is a real burden upon the lands to a proportional part whereof he is intitled to return. Beſides, a contract of ſale is, in effect, as much diſſolved upon the eviction of the ſubject ſold as the contract of permutation is: Nor is there any inconſiſtence for a purchaſer of land, from whom a ſum of money, which was a real burden upon his purchaſe, has been recovered, to recur to as much of the property of the warrandice-lands as will anſwer that eviction, the matter being more eaſily extricated here than in the common caſe of an eviction of lands, ſeeing there muſt be a proof of the value of theſe; whereas, in the other, the extent of the eviction is clear. And, with reſpect to the ſuppoſition of the real warrandice lying upon a mill or teinds, the defenders cannot diſcover any thing in the leaſt contrary to law, that, in ſuch a caſe, recourſe ſhould be had to lands equal in value to what was evicted; for, it is not neceſſary, that the rents of the two ſubjects ſhould be equal, but that the value thereof ſhould be the ſame. And if the caſe ſuppoſed ſhould happen, of a ſubject affected with a real warrandice, which was alſo affected with a preferable liferent, the accepter of ſuch warrandice muſt be underſtood to have relied upon the perſonal ſecurity of his author, in caſe it ſhould happen that the lands principally diſponed were evicted before the liferent was extinguiſhed.

The Lords found, That the infeſtment of warrandice gives the purſuer a real right and ſecurity in the warrandice-lands, not only to the extent of the value of the principal lands at the time of the eviction, but alſo, that the ſaid real ſecurity extends as far as the perſonal obligation of warrandice to all his damages, ariſing before or after the eviction, without any fault in the purſuer.

N° CLXXX.

No CLXXX. *November* 11. 1741.

Robert Cockburn contra *John* and *James Grants.*

No action lies for damages, on account of the not delivery of run Goods, if the buyer knew them to be such at the time of the bargain.

THE said *Robert Cockburn* purchased some ankers of *French* brandy from the *Grants*, part of which he received and paid the price thereof; but the price having risen, the other part was not delivered, whereupon he brought an action against them for damages.

Pled in defence, That the pursuer knew that the brandy was run or prohibited goods, and consequently the bargain fell under the statute, *undecimo Georgii I.*, that the commerce of such subjects was plainly prohibited by that act; for besides the general prohibition to import such goods without regular entry and payment of the duty and the severe penalties therein specified, it is enacted, "That if any person shall "offer or expose to sale any such goods, wares, *&c.* the same shall be "forfeited, and the person to whom they shall be offered to sale, may "seize the same for his own behoof; and further, the person who so of-"fers and exposes them to sale, is made liable in triple the value, "and by another clause, such goods may, after delivery to the buyer, "be seized and taken from him by the very person who sold the same; "and the buyer is also made liable in triple the value". It is true, the statute does not, in terms, discharge the buying and selling of goods, so unlawfully imported; yet there can be no doubt, that such prohibition is strongly implied from the whole scope and purport of the law, where they are not only prohibited to be imported without payment of the duty under high penalties, but when so imported contrary to the prohibition, are in effect discharged to be bought or sold. For it is plainly impossible, the common rules of law in emption and vendition, can take place in a consistency with what is statute in the act. How can there be a proper sale, where the property of the thing sold, neither is, nor can be transferred, but the goods may be retaken by the seller himself, immediately after delivery. If the defenders could not have obliged the pursuer to pay the price, tho' the goods had been delivered, it follows, that he cannot bring an action for delivery, or damages in case of not delivery; and so it was determined, *November* 16. 1736. *Scougal* and *Young*.

Answered, There was nothing in the title or statutory part of the law which could support the defence. *2dly*, Where certain penalties are inflicted by law, quite different from that of annulling the contract of sale, upon those who buy and sell such commodities, in some cases, those very penalties cannot be incurred without a previous sale; as particularly, in this statute, the seller may seize the goods from the buyer; but no other person, except an officer of the customs or excise, can do this; which shows, that nothing can give him this privilege, but the contract of sale, completed by delivery. If so, it must follow, that the sale is not prohibited, but that there is a necessity for a sale before the penalty can take place. *3dly*, There is a very great difference between

an act discharging all buying and selling of such and such goods, and, in case of sale, declaring the bargain to be void and null, and an act which only prohibites the buying and selling under a penalty. Besides, it is plain from the whole clauses, that the Parliament carefully avoided the enacting of any thing so as to annul a bargain of sale, tho' at the same time, they enacted such penalties as would have had the same effect, had advantage been taken of them. 4*thly*, There is no such thing known in the laws of *England*, as an implied prohibition: further, the the buyer has the power first to seize, and the seller never has power to seize, except the buyer neglect to take the benefit of the law; so they are not upon a level: But if, by implication, the buyer shall be denied action, then the buyer becomes the most unfavourable person of the two, contrary to what ought to be, seeing the seller is the person who imports such goods.

The Lords found the pursuer could not maintain an action for recovering damages in this case.

CLXXXI. *November* 13. 1741.

Competition betwixt *Andrew Drummond*, &c. and Mrs *Helen Cuningham.*

An apparent heir does not bear the expence of a sale at his instance, where there is no reversion.

THE question betwixt these parties was, whether the expences of a process of sale carried on by an apparent heir, fell on the heir or creditors.

For the creditors it was urged, that as such process could be brought by the apparent heir without the consent of the creditors, and that no compulsiture was competent to them to force the heir to bring such an action, they could not be burdened with the expence, and that it was not a sufficient foundation for the heir's claim of a proportion of the expences, that possibly the creditors may reap benefit thereby, by receiving payment of their debts out of the price; for the rule of law is, that one who carries on an action for his own behoof, will have no claim to a share of the expences from a third party who may receive benefit from the event of the action. Neither is the rule in the case of bankrupts estates, that every creditor bear a proportion of the expence according to what he shall draw anywise similar; for in that case, every real creditor is intitled to commence an action of sale, and if the carrier on delay, any other real creditor may take it up, and the lands cannot be sold until the ranking be finished; so that, in effect, the carrier on of the process *gerit commune negotium*; but it is quite otherwise in a sale by an apparent heir, he alone can bring the action, and it will be no exception, tho' it could not be proved, that the defunct owed not a shilling; he can stop when he pleases, and no creditor can take it up, nor is there any compulsiture against him to proceed; it is not necessary that a ranking

ranking proceed, and poſſibly it may not be neceſſary after the ſale; and therefore no argument can be drawn from the one caſe to the other.

For the apparent heir it was obſerved, that it would be unreaſonable to make any diſtinction betwixt the two caſes, where the eſtate was bankrupt, as the apparent heir acts in ſuch a caſe for the common behoof of the creditors. They take the whole benefit, and therefore muſt bear the burden; if there were any difference to be made, it lies in favours of the apparent heir; for in every inſtance, where the eſtate is bankrupt, if the apparent heir is not a creditor himſelf to the defunct, he is ſolely acting for the benefit of the creditors; whereas, in a proceſs of ſale at the inſtance of a creditor, the purſuer is managing for his own intereſt, as well as that of the other creditors; and yet if the contrary were to hold, ſuch apparent heir muſt pay the whole expence out of his own pocket; which were moſt glaring iniquity. Neither is it of importance, that an apparent heir may or may not bring ſuch proceſs, ſeeing it will not follow, that when he brings it for the common behoof of the creditors, he ſhall not be intitled to his own expence? Is it not in the option of any real creditors, to intent a ranking and ſale of a bankrupt eſtate at this day? But is that a reaſon for ſubjecting him to the expence? Agreeable to which it was determined, 3d *Feb.* 1738, creditors of *Nicolſon* of *Trabrown*.

The Lords found, that the apparent heir, who draws no ſhare of the price as ſuch, is not to be burdened with the expences of the ſale and ranking; but that the ſame is to be paid by her, and the other creditors proportionally, effeiring to the ſums they ſhall draw of the price of the ſubjects ſold.

CLXXXII. *November* 17. 1741.

Competition betwixt *William King* of *Newmill* and *Innes* of *Dunkinty*.

The firſt charge on an adjudication renders it the firſt effectual one, tho' the adjudger did not offer the ſuperior a charter and a year's rent.

Innes of *Dunkinty* being creditor to *Stewart* of *Caſtlehill*, obtained Decreet of Adjudication of his lands upon the 14*th June* 1716, and on the 26th of *December* thereafter, he charged the ſuperior with horning. *William King* being likewiſe a creditor of *Caſtlehill's*, obtained Decreet of Adjudication of his lands upon the 1*ſt January* 1718, and having applied to the ſuperior, and paid the uſual compoſition, he obtained a charter of the ſaid lands of *Caſtlehill*, *anno* 1721, and was thereon infeft the 4*th December* that ſame year, in the ranking of the creditors, it was inſiſted for *Dunkinty*, that the charge on his adjudication, made it the preferable one, and that *King*'s ſhould be poſtponed to his, as being without year and day thereof.

For *William King* it was urged, that the only rule for determining this queſtion, was the act 1661, which eſtabliſhes a *pari paſſu* preference of all compriſings which come within year and day of the firſt effectual one; and it further declares, what ſhall be held to be the firſt effectual compriſing,

compriſing to wit, either that on which infeftment has followed, or *the firſt exact diligence for obtaining the ſame.* Now, the loweſt degree of diligence which can come under this deſcription, is ſuch a requiſition of the ſuperior, as he is bound in duty to comply with, and as will put him in *mora*, if he refuſes to comply; leſs than this can hardly be thought a ſufficient intimation to the ſuperior, far leſs come under the deſcription of exact diligence for obtaining infeftment, which is required, to intitle a compriſer to a preference to all other compriſings, as the firſt effectual one. In this caſe, *Dunkinty* did not offer a charter and a year's rent, whereby the ſuperior was no more bound to enter him, than if no charge at all had been given; and ſo it was decided, *6th February*, 1669, *Black*; conſequently, *King*'s adjudication, on which charter and ſeiſin followed, is the firſt effectual one, and muſt be the title for connecting the real right of the lands in all time coming. And as the creditors cannot avoid taking the benefit of his Infeftment, they ought to be found liable to him for the expence, by which that title was made up.

Anſwered for *Dunkinty*, that he could not diſcover upon what reaſon or authority, the interpretation now inſiſted on, is founded; the law has required *exact diligence*, but it has no where mentioned or ſuppoſed ultimate diligence by denunciation or caption; horning alone has been thought ſufficient to interpel the ſuperior, ſo as thereby to debar him, by any voluntary act, to prefer a poſterior adjudger, by giving him an infeftment. And this ſeems agreeable to the reaſon of the thing, and the nature of the diligence; for an adjudication being but a *pignus praetorium*, the ſuperior, cannot in that time, compel the adjudger to enter, becauſe he may be redeemed; and for the ſame reaſon, there can lie no neceſſity upon an adjudger, to offer a charter or a year's rent along with his charge; beſides, uniform practice has eſtabliſhed it to be that *exact diligence* which the law has required, to make that adjudication effectual upon which it is uſed; and ſo it has been determined laſt of *January* 1632, *Ferguſon*. *See Stair tit.* Infeftments of property, §. 30. p. 211. And it is begging the queſtion, to ſay, *King*'s infeftment is the only title for connecting the real right of the lands in all time coming; for, if it was unduly given, it can have no effect: On the contrary, at whatever time *Dunkinty* ſhall obtain his infeftment, it muſt draw back to the date of his charge, which, by itſelf, is ſufficient to make his adjudication effectual; and if this is the rule of preference, no queſtion can remain concerning the expences of *King*'s infeftment or his compoſition; for though by the ſtatute, the creditors are burdened therewith, yet it is only in reſpect of the benefit which thence accrues to them, and where no ſuch benefit ariſes, there is no foundation for the claim.

The Lords found, that Dunkinty *having charged the ſuperior upon his adjudication in anno* 1716, *the ſame is thereby the firſt effectual adjudication; and therefore,* William King *of* Newmiln, *cannot claim the compoſition paid by him to the ſuperior, nor expences of his charter and infeftment, anno* 1721 in hoc ſtatu, *the other creditors having no benefit thereby; reſerving to the ſaid* William King, *action againſt the other creditors, in ſo far as they may have benefit from his infeftment againſt the ſuperior's claim of non-entry, or otherwiſe, as accords.*

CLXXXIII.

CLXXXIII. *November* 24. 1741.

Samuel Hendly contra *Sarah Guillin.*

The Engliſh exception to a bond, that non eſt factum, *is not competent after a peremptory defence has been proponed and repelled.*

ANNO 1701, *David Guillin* Merchant in *London*, granted a double *Engliſh* bond for 80 pounds to *Jervis Hendly*, with a condition, that, upon payment of L. 40. on the 1*ſt* of *October* thereafter, the obligement to be void. In a proceſs on this bond, the executor to the debtor pled the 20 years preſcription, competent by the *Engliſh* law, after elapſing of which time, the debtor has a plea competent to him, that *ſolvit ad diem.*

Anſwered, The debtor lived all that time out of the kingdom, and this being acknowledged, the defence of preſcription was repelled. Thereafter, the defender pleaded the *Engliſh* defence, that *non eſt factum*, the effect of which was, that the creditor behoved to prove, that the debtor ſigned and ſealed the bond, before he could obtain decreet for payment, and that this was incumbent on the creditor, when the bond was ſued on here: for ſince the conſtitution of the debt, is according to the form of *Engliſh* deeds, the defences againſt the ſame muſt likewiſe be thereby regulated.

Replied for the purſuer, that there was no real ground for pleading this objection, there being not the leaſt ſuſpicion of the verity of the bond; more eſpecially as the debtor himſelf while on life had acknowledged it, by making a partial payment marked on the bond; and if the defences were to be regulated by the *Engliſh* law, it was neceſſary, that the defender ſhould be tied down by the rules thereof; one of which is, that, after a defender has once pled a peremptory defence, or, as it is called, a plea in bar of the action, and the ſame is over-ruled, he is not thereafter allowed to plead a new defence, and thereby protract the plea without end, and that the defence *non eſt factum*, was quite different from that of improbation, as it is tried by the law of *Scotland*. In the laſt, a litiſconteſtation is made upon facts which the defender undertakes to prove. Here it cannot be pretended, that the writ is falſe; only an objection is laid hold of, which, by the *Engliſh* law, is allowed againſt every writ whatever, that the party who pleads upon it, muſt inſtruct the verity and truth of the deed otherwiſe than by the deed itſelf. See *Coke's inſtit.* vol. 1. p. 304. *Lilly*'s *practical regiſter, tit. Pleas, p.* 301. Had this caſe been tried in *England*, both theſe defences *ſolvit ad diem*, and *non eſt factum*, were only triable by jury; and after the defender had relied upon the firſt, and a verdict given againſt him, it is impoſſible to imagine, that he would obtain a new trial upon the ſecond. And this ought the rather to hold in this caſe, that theſe two defences are quite inconſiſtent, ſeeing the firſt reſolves into a preſumptive payment, which is an acknowledgment of the bond; whereas the other is a denial, that the bond was granted.

Duplied, The defence reſolves in a denial of the verity of the bond; and ſo is in effect the debtor's proponing improbation againſt the ſame, which, with us, is the laſt of all exceptions, and the only difference lies

in this, that, by our law, the preſumption is in favour of the deed, and therefore the defender muſt improve it; whereas, in *England*, the creditor muſt either ſuppport it, or loſe his debt. If indeed this caſe had been tried in *England*, both defences muſt have been laid before the jury at once; but this is inconſiſtent with the method of proceeding here. A peremptory defence of actual or preſumptive payment muſt be diſcuſſed before the defence of improbation can be proponed, and as a defender may have many defences, it would be great injuſtice to debar him from any of them.

The Lords repelled the defence on the bond purſued on, quod non eſt factum, *and found the ſame not competent after the defence of preſcription formerly proponed and overruled.*

CLXXXIV. *December* 1. 1741.

Agnes Forreſt and her Husband contra *Archibald Forreſt.*

From what period annualrent became due on a proviſion to a child, which was payable in the event of an impoſſible condition.

THE deceaſed *Archibald Forreſt* diſponed his eſtate, being about 5 or 600 merks yearly, to *Archibald* his eldeſt ſon, burdening him with 500 to *Agnes Forreſt* his eldeſt daughter, payable at her marriage or majority, which ſhould ever firſt happen, who, after her father's death, brought a proceſs againſt her brother for payment thereof, and ſhe inſiſted only for the annualrent from her majority. The defence was, that annualrent did not become payable till the death of *Archibald* the father, and ſo could not begin to bear annualrent till decreet was obtained therefore and horning uſed againſt the defender, in reſpect that the diſpoſition was only dated in the 1735, whereas the Purſuer was major in the 1732: And as the proviſion is only to the Purſuer at her majority, whenever the ſame ſhould happen, the condition under which the proviſion was payable, at the time of the deed, was abſolutely impoſſible, ſince thereafter ſhe could not become major. Beſides, it is a rule in law, that wherever an impoſſible condition is annexed to a deed of a teſtamentary nature, the condition does not annul the legacy, but the ſame is pure, and the condition is conſidered as if it had not been adjected, according to §. ii. *inſtit. de inutil. ſtipul.* which muſt hold more particularly in this caſe, as it would ſeem to have been the father's intention, that the proviſion ſhould not be payable till after his own death, he obliging his ſon, in an after clauſe of the deed, to aliment and maintain the purſuer at bed, board and cloaths, till ſuch time as her portion ſhould become payable.

Anſwered for the purſuer, that theſe words, *which ſhall firſt happen,* cannot be at all underſtood to imply, that the payment of her proviſion was ſuſpended by a future condition. The only uſe of theſe words was, to point out, that either of the two periods, majority or marriage, which firſt happened, was the term from which her proviſion ſhould bear

bear annualrent, but not that he conſidered either of theſe events as a term or period yet to come; and if theſe words, *which ſhall firſt happen*, had been left out, there could be no doubt, the purſuer's demand would be beyond diſpute. See *November* 25. 1686, *Kelſo*. But granting it were to reſolve in a *quaeſtio voluntatis*, which ſhould always determine caſes of this nature, it is evident, that the father intended the proviſion ſhould bear annualrent from one of theſe two periods which ever ſhould firſt happen. The Purſuer was married before the date of the deed, and as the huſband took the burden of maintaining the purſuer off her father, was it not reaſonable he ſhould have intereſt in return upon the proviſion. 2*dly*, The purſuer's younger ſiſter's proviſion was payable to her by the ſame clauſe at marriage or majority, which ſhould firſt happen; ſo that the teſtator's preſumed will is evident, and ought not to be got the better of, by a catch at a word, inaccurately thrown in by the writer of the deed, eſpecially as the teſtator was a countryman of little education, unacquainted with the ſtile of writs.

The Lords found, that annualrent became only due at the firſt term after the father's deceaſe.

CLXXXV. *December* 3. 1741.

Competition betwixt *Dunbar* of *Burgie* and the other Creditors of *Stewart* of *Caſtlehill*.

Inhibition, its effect.

IN the ranking of the creditors of *Caſtlehill*, *Dunbar* of *Burgie* produced a decreet in the year 1705, of the Privy Council of *Scotland*, againſt *Caſtlehill* for 2000 pounds *Scots*, with an Inhibition thereon, in *January* 1705, and an adjudication on this ground of debt in *November* 1737, and craved that he might be preferred to the other creditors for the principal ſum and annualrents due thereon ſince the date of his adjudication. The other creditors likewiſe produced ſeveral heritable and moveable bonds, granted by the common debtor, poſterior to the inhibition, and agreed that *Burgie* ſhould be preferred for the ſum contained in the decreet upon which inhibition was uſed; but objected, that the creditors who are infeft prior to *Burgie's* adjudication, though their grounds of debt are ſubſequent to the inhibition, muſt be preferred to *Burgie*, in ſo far as concerns his annualrents, which were not due by the decreet upon which inhibition was uſed, but only became due upon the adjudication, which was led a great many years after; that an inhibition ſecures the ſums contained in the ground of debt upon which it is uſed, and interpells all poſterior contractions, to the prejudice thereof, but cannot ſecure a debt, which, at that time, had no exiſtence; and ſuch are the annualrents now claimed, which, at the date of the inhibition, were neither due by any act of the party, nor by the operation of law, but became due by an after contingency, which was then uncertain if it ſhould ever happen or not. The creditors who contracted, were interpelled by the inhibition, only to the extent of the ſums therein mentioned, but were not

bound

bound to conjecture whether the inhibitor might afterwards, by any legal diligence, either of denunciation or adjudication, eſtabliſh to himſelf a claim for annualrents. The adjudication in this caſe cannot be drawn back to the inhibition; becauſe the interveening rights of the creditors, who obtained infeftments betwixt the date of the one and the other, are ſo many *media impedimenta*, which hinders the adjudication to be drawn back to any further extent than the ſums actually ſecured by inhibition; ſee 9th *February* 1683, *Trotter*.

Anſwered, That inhibition muſt, from the nature of the thing, ſecure not only the particular ſums ſpecified in the ground of debt upon which it is founded, but alſo all the natural conſequences of the diligence deduced thereupon: That the very common ſtile of inhibitions imports, that the creditor inhibiting was about to do diligence, and ſue execution againſt his debtor's lands and eſtate; and that the debtor intended to diſappoint his diligence by voluntary alienations; and therefore it is, that inhibition is iſſued out to prohibite him, ſo to diſappoint the creditor and to interpel the lieges. Every party who thereafter contracts with the debtor muſt know, that he cannot compete with the diligence to be done by the inhibitor for affecting his debtor's eſtate; though adjudication is not then led, yet it is apparent that inhibition is uſed with a view to ſuch adjudication afterwards to be led; for without it, the inhibitor cannot affect the ſubject, nor draw any part of his debt out of it; and therefore the inhibition and adjudication muſt neceſſarily be connected together, as if they were one and the ſame diligence: The one is no more but a competition and following out of the other. And it is not tenible to ſay, that the interveening infeftments can hinder the inhibitor's adjudication from being drawn back to it; if they could, no inhibition ſhould ever have any effect: For, unleſs the adjudication is drawn back to the inhibition, the inhibitor can have no preference upon the ſubject, not even for the original debt: When he is preferred for that, it is only upon this footing, that his adjudication gives him a legal right to the ſubject, which the creditors who contract after inhibition are excluded from challenging; and if the ſubſequent adjudication is not liable to challenge at their inſtance, it muſt ſubſiſt and be effectual, in the manner, and to the effect for which it was led; that is, to make the adjudger a redeemable proprietor of his lands from the date of his adjudication; ſee 24th *February* 1666, *Grant*.

Replied, The objection againſt the preference claimed for the annualrents is ſtill good; ſeeing the debt itſelf, by its original conſtitution, did not bear annualrent: and no diligence was done thereon, whereby intereſt could be created upon it, for upwards of 32 years; during all which time no perſon could be interpelled or debarred from contracting with the party, except in ſo far as concerned the debt in the inhibition; and the miſtake ſeems to lie in this, as if the annualrents in queſtion were the natural conſequence of the debt; which, in this caſe, it is not, but is purely caſual, proceeding upon diligence optional to the creditor to have uſed or not; and therefore can have no effect till it is uſed. The caſe indeed might be different where the intereſt aroſe from the obligation; for, in that caſe, a poſterior creditor is at leaſt in ſome ſort interpelled; but where the intereſt is not part of the obligation, but is created only by the operation of the law, and is the conſequence of the diligence,

diligence, and not of the debt, it is then to be conſidered as a new and ſeparate debt, ariſing *ex nova cauſa*, and can no more be ſecured by the inhibition, than if it were contained in a ſeparate bond, granted to the inhibiter himſelf, upon which inhibition had not been uſed; and conſequently, ſuch ſeparate bond would not be ſecured or affected by the inhibition; and if it were otherwiſe, it would give an effect hitherto unknown in law, to this ſort of diligence, and make it productive of annualrent, altho' the obligation on which it proceeded, carried none. An inhibition is indeed a prohibitory diligence, and affords a ſecurity to the debt on which it proceeds; but then this ſecurity can go no further than the preciſe terms of the prohibition; every creditor who ſees an inhibition, muſt lay his account to be no further liable than to the extent of the debt on which it proceeds; were it otherwiſe, creditors might be greatly enſnared, which applies ſtrongly to the preſent caſe, where the diligence which creates the intereſt, was not followed out for ſo long a time after the exiſtence of the debt. See *July* 27. 1666, *Lord Borthwick*. As to the obſervation upon the ſtile of inhibitions, that it ſuppoſes the inhibiter is about to do diligence, and therefore muſt ſecure ſuch diligence, the argument will not hold; for that is no more a proof of the creditors intention, than it is of the deſign of the debtor to alienate his lands, to diſappoint the inhibiter. Words of mere ſtile can, in ſuch caſe, prove little, and ſurely cannot extend the effect of the inhibition beyond the debt, upon which it proceeds, and it is as little to the purpoſe, what is further obſerved, that the adjudication muſt neceſſarily draw back to the inhibition, otherwiſe the adjudger could never have a preference: For although this is true, that the adjudication draws back to the inhibition, yet this can only be in ſo far as concerns the debt on which the inhibition proceeds, but cannot reach that which is the conſequence of the adjudication only, and not of the ground of debt or inhibition, to the prejudice of the intermediate real creditors, poſterior to the inhibition, but prior to the adjudication.

The Lords found, that the inhibiter was to be ranked for his accumulations retro *from the date of his inhibition.*

CLXXXVI. *December* 9. 1741.

James Leith againſt *Alexander* Lord *Bamff.*

An apparent heir's intromiſſion with rents falling due during the apparency of one who was three years in poſſeſſion, but to whom he renounced to be heir, does not infer a paſſive title, but makes him only liable in valorem.

JOHN Lord *Bamff*, after poſſeſſing his eſtate for ſeveral years, (at leaſt more than three), died in a ſtate of apparency, whereupon it devolved to *Alexander* his younger brother, who continued to poſſeſs the ſame, without making up any titles thereto. *James Leith* a creditor of *John*'s brought a proceſs againſt *Alexander* the preſent Lord, alledging, that the defender had, under the title of his apparency, intromitted with the rents which fell due in his brother's time as well as thoſe ſince his death, and therefore concluded, that he ſhould be liable to the purſuer in payment. The defender renounced to be heir to his brother; whereupon this

queſtion occurred, whether, notwithſtanding the renunciation, he was liable for his brother's debts, in conſequence of the ſtatute 1695.

For the purſuer it was *urged*, That as the law has conſidered three years poſſeſſion of the apparent heir to be ſufficient to conſtitute the creditors in *bona fide* to contract with him, and conſequently had in view, that creditors ſo contracting, ſhould recover their payment out of the eſtate, to which that apparent heir might have compleated his titles; ſo the ſameſt atuteconſiders it as fraudulent on the part of the apparent heir, who thus layout unentered, to the prejudice of his juſt and lawful creditor which fraud was ſpecially intended to be thereby remedied. Both the rubric and recital of the ſtatute, bears to be for correcting the frauds of apparent heirs; conſequently it ought to be conſtructed in the moſt favourable way, ſo as to remedy the evil which it intended to obviate: And if this is the principle that the law proceeds upon, it ought ſurely to be extended *de caſu in caſum*, ſo as to attain what was obviouſly the intention of the legiſlator; nor is it any objection, that the enacting words allenarly reſpect the caſe of an heir actually ſerved, or, by his own bond ſucceeding to a remoter predeceſſor, ſince the ſtatute had not only in view to obviate the frauds of apparent heirs, but alſo to provide for the payment of the juſt and lawful creditors of the apparent heir. It was not the making up of titles in this or the other way that was deſigned to be remedied, but the uſe that was made of the titles ſo eſtabliſhed, to avoid payment of the debts of the apparent heir; as, to this hour, even ſince the act, theſe are the moſt proper, if not the only methods of connecting the titles to the perſon who died laſt infeft. And this ſhould hold the more eſpecially, as there is no taxative words in the law, to limit the benefit intended to the two caſes ſpecially mentioned. Suppoſe the caſe, that the defender had obtained from the ſuperior a precept of *clare conſtat*, and been thereon infeft as heir to his predeceſſor, who had died laſt veſt and ſeized; in propriety of language, this would not be an actual ſervice, or ſucceeding by adjudication on the apparent heir's own bond: yet as in the eye of law, it was doing the very ſame thing in another ſhape, it is impoſſible to think, that the legiſlator could poſſibly mean, that ſuch perſons ſhould thereby get free from payment of his immediate predeceſſor's debts. Were the act to be otherwiſe conſtrued, this abſurdity would follow, that the apparent heir's poſſeſſion, without making up any titles, which is a ſort of vitious intromiſſion, and infers a general paſſive title, would be more beneficial than a regular entry, tho' in all other inſtances, the irregular addition is attended with penal conſequences, from which the heir regularly entering, may be free. Beſides the purſuer's plea is even founded in the words of the law, by which the perſon interjected is called the predeceſſor of the apparent heir, who paſſes him by, as well as the perſon laſt veſt, to whom the apparent heir connects by ſervice, and by a poſterior clauſe, the apparent heir poſſeſſing, is made univerſally liable to his predeceſſor's debts; that is, both to the debts of the interjected perſon, and of the predeceſſor laſt veſt and ſeiſed; conſequently the defender is liable on the ſtatute to pay the laſt Lord's debts, the laſt Lord *Banff* being, in the ſenſe of the act, the defender's predeceſſor.

Anſwered for Lord *Bamff*, That by the common law of *Scotland*, where the rule dos not obtain, that *mortuus ſaſit vivum*, the debts of an apparent heir dying unentered, died with himſelf; they could not be made effectual againſt the eſtate, nor againſt the next apparent heir paſſing him by. The ſtatute 1695, introducing a remedy in this caſe, cannot, nor does not

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go upon any intentional fraud in the next apparent heir, who himſelf had never made up any titles to it; and therefore cannot be ſuppoſed, to intend any fraud in paſſing him by. It was intended ſolely to relieve creditors, lending their money to a perſonal poſſeſſion, either not ſtrictly inquiring, whether the borrower is infeft, or hoping, that he will ſoon take that ſtep for his own benefit and theirs. It is a correctory law, introducing a paſſive title *contra communes regulas juris*, conſequently cannot be extended *de caſu in caſum*: So far as it provides a remedy, it is the part of judges to apply it; but where it ſtops ſhort, they cannot go on to provide a further remedy: This would be a legiſlative power which judges have not. It is likewiſe a miſtake to ſuppoſe, that, in all caſes where an apparent heir has been three years in poſſeſſion, there muſt be a remedy in law, to make his debts effectual. Let us ſuppoſe, that the next apparent heir, inſtead of paſſing him by, contracts debt to the value of the ſubject, and allows the eſtate to be carried off by legal diligence for payment of thoſe debts: In this caſe, there is no remedy provided for the interjected apparent heirs debts. And ſeveral others may be figured, even where titles are directly made up to the eſtate by the apparent heir paſſing by, for which the law has provided no remedy. At firſt view, it may naturally be thought the intention of the ſtatute, to oblige an heir, in whatever manner he makes up titles to the eſtate, to pay the debts of the interjected apparent heir, who was three years in poſſeſſion, ſo far as he is benefited by the ſucceſſion. Even this fails in ſeveral inſtances: But ſurely the act never intended, that an heir continuing in apparency, without making up any titles, ſhould be liable to the interjected heir's debts, to the value of that eſtate, of which poſſibly he has not uplifted one full year's rent. And it is a miſtake to ſay, that the interjected perſon is conſidered as predeceſſor to the apparent heir who paſſes him by, becauſe, tho' the ſtatute talks of a man's ſucceeding to his immediate or remoter predeceſſor, it does not follow, that when one ſucceeds to a remoter predeceſſor, the perſon interjected, muſt alſo be underſtood to be a predeceſſor. 2*do*, Suppoſing the act were inaccurately worded, which is by no means the caſe, yet it would be an unſound method of interpretation, to carry this inaccuracy to the ſecond clauſe, in which it is moſt obvious, that by the word Predeceſſor is meant the perſon who died laſt veſted and ſeized, and denied that he had touched any of the rents which fell due in his brother's lifetime.

The Lords found the preſent Lord Bamff's *intromiſſions with the rents falling due, during the apparency of the laſt Lord, does not infer a paſſive title; but makes him liable to the laſt Lord's creditors,* in valorem *of his intromiſſions; and repells the paſſive title, alledged on the Act of Parliament,* 1695.

N° CLXXXVII. *January* 15. 1742.

Lord *Braco* againſt Sir *Hary Innes*.

A verbal promiſe not to remove a tenant is not probable by the maſter's oath.

ANNO 1724, Lord *Braco* ſet a tack for nine years of his ſalmon-fiſhing in the *Spey* to Sir *Hary*, and after the term was expired, charged him to remove. Sir *Hary* ſuſpended on this ground, that the charger had frequently

frequently promiſed not to remove the ſuſpender, as long as he paid the yearly tack-duty, and offered to prove it by his oath; ſo that the queſtion reſolved in this, how far or how long a verbal paction, or promiſe not to remove a tenant may ſubſiſt, and be effectual.

In ſupport of the reaſon of ſuſpenſion, it was urged, that tho' it be held to be the law of *Scotland*, that verbal tacks are only good for one year, and conſequeutly may not be probable by witneſſes, ſo as to have effect for a longer ſpace, or not be good againſt ſingular ſucceſſors; yet the preſent caſe is ſomewhat different, where the promiſe or paction not to remove the ſuſpender, is offered to be proven by the oath of the charger, which is not to create a real right without writing; but the ſuſpender being already in the natural poſſeſſion of the ſubject, is intitled to continue therein, paying his rent by tacit relocation, until that be taken off, by warning, *&c.* which has been uſed in this caſe: But the queſtion is, whether a paction or promiſe, on the part of the purſuer, if the ſame ſhall be acknowledged, does not afford a ſufficient exception in this action, ſo as to repel, *perſonali exceptione*, the purſuer from inſiſting therein, contrary to ſuch paction. The rule *quod pacta ſervanda*, &c. admits indeed of various exceptions; but this queſtion does not fall under any of them; for here the promiſe is not to do or perform any thing, conſequently the obligation reſulting therefrom is compleated, being no more than to abſtain from warning or removing the ſuſpender, while the charger continues heritor, and the tenant pays his rent duly. The point therefore comes to this, what ſhall be the effect of this promiſe? the ſuſpender believes it reaches further than a year, and is not ſufficiently implemented, by forbearing removing for a year after the iſh of the written tack; becauſe the matter of the paction went further than that. It was not circumſcribed to any time; but depended on the payment of the tack-duty. See *Spotiſwood, tit.* removing, p. 279.

Anſwered for Lord *Braco*, That writing was neceſſary to the conſtitution of a tack for a term of years, not only becauſe ſuch rights as tacks being heritable, and concerning lands, are reckoned matters of importance; but when granted for a term of years, are deemed alienations: Hence it is, that the promiſe to grant ſuch tacks, or even the verbal ſet for a term of years, can never have any effect, altho' offered to be proved by the party's oaths, See *16th July* 1636, *Keith*, *15th July* 1637, *Skene*. Nor is there any difference betwixt an heritor's paction or promiſe, to continue or prolong a tack for terms of years to the former tackſman, and a paction or promiſe, that he ſhould not remove the tackſman, after the determination of a tack current. This at leaſt is obvious, that both have the ſame effect; and it is a fair conſequence, that where the effects of both are the ſame with reſpect to maſter and tenant, both ought to be governed by the ſame rules in law, that is, that ſuch pactions ought to be eſtabliſhed by writ, according to the uſual ſolemnities, and wherever writing is to be interpoſed, there is *locus poenitentiae* before the ſame is ſubſcribed.

The Lords found the reaſon of ſuſpenſion not relevant to oblige the charger not to remove the ſuſpender for more than one year after the iſh thereof; and it not being denied by the ſuſpender, though alledged by the charger, that the ſuſpender has had allowance to poſſeſs two years ſince the iſh of the tack, found

there

there was no need of any proof of the agreement, mentioned in this reaſon of ſuſpenſion, the ſame being already ſufficiently implemented as far as it was obligatory; and therefore repelled the reaſon of ſuſpenſion.

CLXXXVIII. *February* 5. 1742.

Mr *George Ayton* contra the Creditors of *Aliſon* of *Birkhill*

Exheredation or Excluſion, its effect. 2d. Preſcription of Retours.

FEBRUARY 25. 1675, Sir *John Leſlie* proprietor of the lands of *Newton*, *&c.* reſigned the ſame to himſelf in liferent, and to *John Leſlie* his ſon, *&c.* which failing, to *Clara Leſlie*, his daughter and the heirs of her body; which failing to *Helen Leſlie*, his youngeſt daughter and the heirs of her body; and failing all, to his neareſt and lawful heirs and aſſignies, whatſoever, *&c.* At this time Sir *John* had two other daughters, than the two called by the above ſubſtitution, *viz. Eliſabeth* his eldeſt, and *Mary* his ſecond daughter; and, in the procuratory, he excluded *Alexander Leſlie* of *Balchrome*, and *Mary*, then ſpouſe to Mr *Andrew Bruce*, and the heirs or ſucceſſors procreate, or to be procreate of their bodies, from all right of ſucceſſion to the ſaid lands; and declared, that it ſhould be altogether unlawful to them, to ſerve as heir to him, or to any of his heirs of tailzie and proviſion above written. Upon this procuratory, a charter and infeftment were expede. Thereafter Sir *John* died, and then *John Leſlie*, and *Clara* and *Helen Leſlies*, all without iſſue; ſo that there remained only to ſucceed to Sir *John*, as his neareſt heirs whatſoever, his daughters *Eliſabeth* and *Mary*. *Eliſabeth* died likewiſe, leaving two daughters *Ann* and *Janet Dicks*, who ſerved themſelves heirs-portioners to their uncle *John*. Thereafter *Mary* died, leaving a ſon of a ſecond marriage, Mr *George Ayton*, who brought a declarator of his right to one half of the ſaid lands againſt the creditors of *Aliſon* of *Birkhill*, who had a right to *Janet Dick*'s ſhare, by virtue of a diſpoſition from her, and to *Ann*'s, in virtue of an adjudication. And the points in debate, reſolved in two queſtions, whether the above excluſive clauſe was in law effectual, to debar the purſuer from the ſucceſſion, as one of the heirs of line to his grandfather and uncle? 2*do*, How far the challenge brought by the purſuer againſt the defender's titles, is excluded by the long preſcription, or even by the twenty years preſcription of retours?

Argued for the creditors, That a proprietor of lands could ſettle his ſucceſſion in favours of whatever perſons he thought proper. And as this was a fundamental maxim; ſo *Mary* and her deſcendents being excluded by Sir *John*, of conſequence, *Eliſabeth* and her deſcendents were preferable by the inveſtiture. Further, it was ſaid, that the import of the ſettlement, was the ſame as if Sir *John* had called his heir-general, ſecluding or excepting *Mary* and her deſcendents: In which caſe his whole heirs at law would have ſucceeded in their order, preferably to *Mary*; becauſe they were called to the ſucceſſion, and not *Mary* or her deſcendents; and that it was tantamount, as if, failing his daughters named in the inveſtiture and their iſſue, he had called his heirs whatſoever,

whatſoever, the eldeſt excluding the younger: And there is really here no difference, except that *Mary* is *nominatim* excluded with her deſcendants which cannot make the preference given to *Eliſabeth* leſs effectual. Beſides, ſuppoſing the excluſion out of the queſtion, *Mary* is not called by the ſettlement, therefore ſhe can only claim, under the deſcription of Sir *John*'s heir whatſoever; now it is expreſsly declared, that ſhe ſhall not take under that deſcription, ſo that ſhe cannot claim under this ſettlement; ſhe is neither *nominatim* called, nor under the deſcription of his heirs whatſoever. Beſides, *Eliſabeth* and her heirs do not take the ſucceſſion, in reſpect of the excluſion of *Mary*, they do not take *ab inteſtato*, but by the will of Sir *John*, who, upon the failure of his daughters *nominatim* ſubſtitute, calls his heirs-general in their order, preferably to, and in excluſion of *Mary*; ſo that they take as heirs of tailzie and proviſion, tho' under the character of heirs-general. 2*dly*, It was ſaid, That the defenders were preferable, as the ſpecial ſervice and retour of their authors, *Janet* and *Ann Dicks*, had ſtood unquarrelled, not only for 20, but for 40 years.

Pleaded for the Purſuer, That the excluſive clauſe does not affect him. Sir *John*, it would ſeem, was diſpleaſed with his daughter for marrying Mr *Andrew Bruce*, a miniſter; therefore he excludes her from the ſucceſſion, at the ſame time that he excludes *Alexander Leſlie* of *Balchrome*, and the heirs procreate or to be procreate of their bodies: Now as *Mary* is, in that clauſe, deſigned ſpouſe to Mr *Andrew Bruce*, it is natural to ſuppoſe he meant only heirs procreate or to be procreate betwixt her and Mr *Andrew Bruce*, her then huſband. But granting the Purſuer were included under the ſecluſive clauſe; yet, according to our law, heirs muſt be called to the ſucceſſion of lands, by a direct ſubſtitution in the inveſtiture, and that the heirs who are ſo called, cannot be debarred from the ſucceſſion by an excluſion or exheredation, which go for nothing, if the right is not veſted in another; nor is it believed, there is any inſtance where an inqueſt paſſed by the neareſt heir, becauſe of ſuch excluſion, and retoured another. None of the heirs, who are now in competition, are *nominatim* called by Sir *John*'s deſtination: *Eliſabeth*, it would ſeem, had fallen under her father's diſpleaſure as well as *Mary* the purſuer's mother, and therefore he prefers their younger ſiſters. Neither of the two eldeſt can come in, but under the laſt ſubſtitution of heirs whatſoever; under that character, both are equally comprehended; conſequently the ſucceſſion by the failure of the preceding ſubſtitutes, devolved equally upon both of them, if it is not for the effect of this exheredating clauſe. In the next place, where the termination is upon heirs whatſoever, or the heirs at law, the law muſt have its full operation and effect without diſtinction or bias. The ſucceſſion is, by the inevitable neceſſity of the thing, caſt upon all the heirs whom the law calls, and conſequently muſt operate as well in favours of *Mary* as *Eliſabeth*; for though there is added, with ſecluſion of the ſaid *Mary*, yet that can have no effect, being what the law calls *proteſtatio contraria facto*. It is inconſiſtent and incompatible, that heirs whatſoever ſhould be called to the ſucceſſion; and yet that any one of them ſhould be debarred. The rule of law is, that it is by poſitive inſtitution, and not by excluſion, that heirs are called to the ſucceſſion; whereas, here, if *Eliſabeth*'s heirs are preferred, it is by the excluſion only, and not by any poſitive inſtitution: The deſcriptive words under which they are

called

called, being equally applicable to both; nor does any thing occur in this part of the clauſe, but what is implied in every excluſive clauſe whatever. *Laſtly*, As to the objection to *Ann* and *Janet Dicks* retour, it was anſwered, That the poſitive preſcription could not run until the death of Sir *John*'s Lady, who had a right of liferent provided to her, and who lived down to the 1706: And, with reſpect to the negative preſcription of the reduction of retours in 20 years, it was ſaid, that there was no occaſion in this caſe for a reduction; nothing being more certain, than that an heir of line may ſerve to his Predeceſſors, even at the diſtance of an 100 years, if he is able to prove his propinquity; ſeeing no length of time can cut off the right of blood. It is true, if another heir produce a valid retour, that will exclude him, unleſs the ſame is reduced within 20 years; but, if the retour is null *ex facie*, there is no occaſion for a reduction; a diſtinction approved of in all our law-books. Now, as the excluſive clauſe is recited in the retour itſelf, as the reaſon why *Mary* was not ſerved heir-portioner to her brother, as well as her two nieces; and that the ſaid clauſe is inept and ineffectual: It is juſt the ſame, as if an inqueſt had ſerved a ſecond ſon heir of line to his father, in reſpect that his elder brother had renounced to be heir in a proceſs at the inſtance of one of his father's creditors, which it is believed, is a nullity that could be objected at any time.

The Lords found, that the excluſion of Mary was effectual, and that the ſervice of the grand-daughters could not now be quarrelled.

CLXXXIX. *Feb.* 9. 1742.

Competition, the real creditors of Mr *John Mitchel* Merchant in *Glaſgow*, with *Janet Warden* Relict of the ſaid *John Mitchel*.

A liferent granted by a huſband to a wife, whether a donation or remuneratory proviſion.

THE ſaid *John Mitchel*, in his marriage-contract with *Janet Warden*, became bound to pay her the yearly liferent-annuity of 500 merks, in caſe of children of the marriage, the event that happened; thereafter he, *anno* 1731, purchaſed an old tenement, which had fallen to his wife, and her two ſiſters, by their brother's deceaſe, and the diſpoſition was taken to himſelf and wife, and longeſt liver in liferent and conjunct fee: As alſo it ſets forth, that he had paid 4900 merks to them, as the price of the ſame, whereof each grants for their own part receipt. Mr *Mitchel* razed the old tenement and built a new large one in its place, which coſt him a great ſum of money; and, having become bankrupt, he died in the year 1735. Thereafter his creditors led adjudications againſt his apparent heir, upon which a competition enſued betwixt them and the relict, about the rents of this new tenement.

Pleaded for the creditors, That the liferent-right, ſettled on the widow, by the diſpoſition, was a *donatio inter virum et uxorem*, revocable and revoked

voked by the husband's posterior contractions; notwithstanding thereof, the creditors were willing to yield their preference in the new tenement, to the extent of the yearly rent of the old, wherein she was infeft, which it is believed, amounted to, about L. 20 sterling; and as to the superplus rents, the creditors argued, That the liferent of the old tenement, granted by the husband to his wife *stante matrimonio*, was a donation revoked by the husband's after-contractions; and if her right to the old tenement was revoked, she could lay no claim to the new. 2*dly*, Supposing the liferent to be a remuneratory provision and not revokable; yet, the tenement being thrown down and demolished, her liferent ceased, and she could have no claim to the new one, further than to make up the loss she sustained, by demolishing that wherein she was infeft.

Pleaded for the relict, That she had no other fund to trust to, for implement of the provisions of her contract of marriage, but the rents of this new tenement; and that, when she disponed her third part of the fee, to her husband, alongst with her sisters, with the burden of the liferent of the whole, that liferent was all she got for the disposition of her third part; so that she purchased the same for an onerous cause, it was therefore no donation, and so not revokable. And as to the narrative of the disposition, where she acknowledges having received her third share of the price, it was *inter conjunctas*, and false in fact, as could yet be proven. It remained therefore to be considered, whether any improvements or meliorations upon the subject did accrue to her, during the subsistence of that liferent-right: As to which it was certain, by the principles of law, a liferent gave a full title to every benefit and profit arising from the subject during the continuance thereof. That in this case, as it was granted to take effect at the dissolution of the marriage, it must be understood to be granted *tantum et tale*, as the subject eventually proves to be, at the time the liferent is to take place. If the subject is deteriorate *sine dolo malo*, the liferentrix must sustain the loss; if meliorate, she is intitled to the profit. 2*dly*, If needful, it can be proven, that Mr *Mitchel* touched of his wife's money, (besides this tenement) above 8000 merks, by means of which, he was enabled to build this new tenement; so that, in effect, it was built with the wife's money. But, supposing that the creditors were intitled to reduce the liferent-infeftment *quoad* the excrescent value of the rents of this new tenement, over and above the L. 20 Sterling, which was the rent of the old tenement, in as far as the benefit thereby given to the wife could be construed to be gratuitous; yet she would certainly be intitled upon the same principles as is obtruded against her, to support her liferent, to the full extent of every claim of debt whereby she was an onerous creditor, not only for the L. 20 yearly, as the acknowledged rent of the old tenement, seeing she was a most onerous purchaser of her liferent-right, *quoad* that extent, but likewise for the 500 merks of liferent-annuity, to which she was intitled by her contract of marriage.

Replied for the creditors, That the disposition bears expressly, she got her share of the price; and although the narrative of a deed *inter conjunctas*, may not prove against third parties; yet, where the question is amongst the parties themselves, there is no reason why it should not prove. But supposing it true, she had not got her share, as it was a bargain of sale for a price agreed on in money, she could have demand-

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ed it at any time; and if ſhe had brought a proceſs againſt her huſband for payment, he could have had no defence: It was therefore owing to her own neglect that ſhe did not receive it; ſo that the liferent-right he granted to his wife was not a remuneratory proviſion, ſince the man got nothing from his wife but what he ſtood bound to pay a full price for. Neither does it appear that the relict has any claim for the ſuperplus rents in ſtrict law, more than in equity; for the rule *in ædificatum ſolo*, &c. will not apply to the preſent caſe. If a man ſhould take it in his head, to build on a common in which he is a joint proprietor, the other heritors might ſtop the work; but, if they do not, they have no intereſt in the houſe, further than to make up the damage by the loſs of ground. In like manner (as here) where a man builds upon his liferented property, with a view to profit, or for his own conveniency, without any intention to benefit the liferentrix, ſhe may oppoſe the building; but will not it is thought have any claim, further than for damages. See *l.* 8. and *l.* 5. §. 2. *Quib. mod. Uſufr. amit.* 15*th December* 1704. *Adamſon contra Nicolſon.*

The Lords found, that the wife was intitled to the rent of the houſe, to the extent of the ſum for which ſhe was creditor by her contract of marriage: And, before anſwer as to the other points, remit to be heard, how far the huſband was lucratus *by the wife's ſucceſſion to her brother.*

N° CXC. *February* 4. 1742.

William Robertſon contra *Jean Kerr.*

I. 15*th Act*, 1696.

William Robertſon brought a reduction of his Brother Major *Robertſon*'s teſtament, upon this, amongſt other grounds, That the end of the laſt page did not mention how many pages are therein contained, as is required by the above act.

Anſwered, The Teſtament is wrote upon one ſheet, and the 4 pages are numbered, and ſigned by the teſtator, and the laſt page by the witneſſes; and that as this writ does not fall under the words of the ſtatute, ſo it is not comprehended under the meaning of the act: It conſiſts but of one ſheet; and therefore, there could not be any addition or ſubtraction, which can only take place where a writ conſiſts of more ſheets joined together. The directions of the law are obſerved; every page is marked by the numbers, firſt, ſecond, third; and the laſt page bears number 4th: But the act does not preſcribe any particular form, how the number of the pages ſhall be mentioned, as the act 1686 does with reſpect to ſeiſings. It is true the number of pages is uſually mentioned in the teſting clauſe; but it is without any ſpecial direction from this ſtatute. Neither has it ſaid, that the omiſſion of any of the matters therein required, ſhall infer a nullity.

The Lords repelled this reaſon of reduction.

June 4. 1742.

II. *Though a father leaves his whole moveable eſtate to an only child, with a ſubſtitution to another, yet the child's heir* in mobilibus *is preferable to the ſubſtitute* quoad *the legittim.*

Amongſt ſeveral other points which occurred betwixt theſe parties, was the following one. The deceaſed Major *Robertſon*, by his teſtament, nominate *William Robertſon* his only ſon, then an infant, and the heirs of his body, which failing, the ſaid Mrs *Jean Kerr* his ſpouſe, his executor and univerſal legator, ſubject to certain legacies. Some of the legacies were to be payable by the ſon, and ſome additional ones by the relict, in the event of the ſon's dying before his marriage or majority: *Proviſo* in caſe the ſon ſhould ſurvive his majority, or till he ſhould have iſſue of his body, the additional legacies ſhould become void. And, amongſt the reſt of the additional legacies, there was L. 3000 left to the purſuer and his family. Major *Robertſon* having died ſoon after making his will, the tutors named to the ſon made up the tutorial inventaries of the eſtate which deſcended to their pupil, but never expede any confirmation of the teſtament; and the ſon having died when about 15 years of age, the ſucceſſion devolved upon the relict, in virtue of the ſubſtitution contained in the teſtament, which ſhe confirmed. Of this teſtament the purſuer (brother to the Major) brought a reduction upon various topicks; and, *inter alia*, claimed the legittim or bairns part of gear which belonged to his nephew (the Major's ſon) which he the purſuer had right to, as neareſt of kin to him.

The arguments offered in defence were, That a father was indeed under an obligation to leave a certain ſhare of his moveables to his children; but that it founded oddly, to ſay, that when a parent had left th ewhole eſtate to his only child, that he had not implemented the obligation, and that he ſtill remained debitor to him in the legittim or bairns part. That in this caſe the obligation was implemented in the moſt beneficial manner, when the property of the whole deſcended to the ſon, and the heirs of his body, without any reſtriction or limitation, and the defender is ſubſtituted ſimply to the ſon and the heirs of his body; ſo that upon their failure *quandocumque*, the ſubſtitution in her favours was to take place, unleſs they otherwiſe diſpoſed of the defunct's eſtate. By the civil law, from which we probably derive the legittim, if an only child was inſtitute heir *ex aſſe*, the right of legittim was quite extinct; conſequently, it could neither ſubſiſt in him, or tranſmit to his repreſentatives: agreeable to this, it has always been held to be the law of *Scotland*, that whatever a child receives from his father, ſo far extinguiſhes the legittim; therefore if he takes the whole, it is undoubtedly extinguiſhed. By the Roman law, as the child's claim of legittim was properly a claim of ſucceſſion to the parent, ſo the parent could ſubſtitute to the child the ſame way in the legittim, as he could in the reſt of the eſtate, that is, he could ſubſtitute *ſi heres non erit*; ſo that whether the child predeceaſed the father, or ſurvived, and declined the ſucceſſion, the ſubſtitute took the whole; without diſtinction betwixt the legittim and the reſt of the eſtate. The child had no *querela inofficioſi*, when

when he was called to the whole, and much leſs was ſuch claim competent to the heirs of the child. It is true, that ſubſtitution *ſi heres erit*, was only allowed amongſt the Romans in ſome caſes; yet by our modern cuſtoms any teſtator may ſubſtitute to his heir *ſi heres erit* as to all the eſtate that deſcends from him to the heir. In ſhort, children with us take the legittim as a right of ſucceſſion, much upon the ſame plan they claim a proviſion in their favours in a contract of marriage; conſequently, they cannot be prejudged by gratuitous deeds that are to take place after the father's death, but ſtill they take it as a right of ſucceſſion, and therefore it is liable to a ſubſtitution, in the ſame manner as the father's other moveable eſtate: And upon the ſame rule, when a father dies leaving an only child who has right to the executry, it was never heard of, that the child confirmed only the dead's part, and took up the legittim without confirmation; but it has always been underſtood to be neceſſary to confirm the whole, in order to intitle him to proceed to diligence. Nor is it any objection to this doctrine, *viz.* that children take their legittim as a right of ſucceſſion; that the legittim veſt in them immediately upon the father's death, which the dead's part does not, but requires a confirmation; for this is not peculiar to the legittim; it holds likewiſe in every legacy which veſts in the legator, and tranſmits to his heirs; and yet it will not be maintained, that this excludes a ſubſtitution in the legacy. See §. 6. *Inſt. in officios. Teſtam. l.* 12. *c. eod.* Book of *Majeſty*, *lib.* 2*d. cap.* 37. § 2*d.* 14 act 1617, anent Executors. Inſtructions to the Commiſſars in the 1666.

Anſwered for the Purſuer, That the legittim though derived from the father, is no right of ſucceſſion in the perſon of the child; that it belongs to the child *proprio jure*, and upon the principles of our law, is more properly a ſhare in the diviſion of that moveable eſtate which was in communion during the father's lifetime, the adminiſtration of which was committed to the father himſelf, and veſts in the child the moment that the father dies. And more particularly, that neither by the civil, Engliſh, or Scotiſh law, is it competent to the father, by any deed of a teſtamentary nature, to defeat, impair or burden the child's right of legittim, as is evident from *l.* 30. and 32. *proem. cod. de in officios teſt.* and *Voet.* § 44. *eod. tit.* and all the Doctors conſiders, that a ſubſtitution to the child in this claim of legittim, whereby any other perſon than the child's own heir ſhould be appointed to ſucceed, is a *gravamen impoſitum legittimæ*, which the father had no power to impoſe. And with reſpect to the law of England, though this right of legittim is no part of the general law of that country, yet there are particular counties where it takes place, upon the ſame footing as it is eſtabliſhed in Scotland, as appears from *Swinburn's* treatiſe on teſtaments, *part.* 3. § 16. See likewiſe *chap.* 37. *lib.* 2. *Reg. Majeſt. Stair lib.* 3. *tit.* 4. § 24. *Dirleton de legitt. liber.* and 13*th. July* 1681, *Chriſtie.* In a word, the defender's plea proceeds upon this fundamental miſtake, in ſuppoſing that the teſtament conveyed to her all the defunct's moveable eſtate, under a general ſubſtitution; whereas it neither did or could convey any more to her, than the dead's part, ſince no more belonged to the teſtator ſubject to his power of diſponing. The legittim belonged to, and veſted in the child *ipſo jure*, the moment the Major died, when the teſtament only

only became effectual, and the universal legacy could never be meant to convey more than belonged to the Major, with the burden of debts. And in such a case as this, where the child is not only intitled to the legittim, but is also nominate Executor and universal legatar, *sustinet duplicem personam*, he is intitled to the legittim *proprio jure*, and takes the residue, with the burden of debts *qua* universal legator. *Qua* executor, the child is no doubt liable to his fathers whole debts, onerous or gratuitous; but as intitled to his legittim, he would prevail against any gratuitous deed, whereby his right of legittim would be impaired or prejudged.

The Lords found, that notwithstanding of the testament, the pursuer, as heir in mobilibus *to his nephew the testator's son, has right to the legittim that belonged to his nephew.*

N° CXCI. *June* 10. 1742.

Heritors of the Parish of *Strathmiglo* contra Mr *George Gillespie* Minister there.

Communion Elements.

SOme of the heritors of the said Parish, brought a process against Mr *Gillespie*, before the Sheriff of *Fife*; libelling, That he had neglected to administrate the sacrament for several years; notwithstanding whereof, he yearly uplifted for his own use, the sum modified for communion elements, by his decreet of locality; thereby depriving the poor of the said Parish, of the sum of —— justly appertaining to them by the laws of this Kingdom: Therefore concluding *&c.* The sheriff pronounced the following interlocutor: Having considered this process, with the defences and answers thereto, ordains the defender to produce, a signed condescendence, of the time of his admission as minister of *Strathmiglo*, and of the years he has administred the sacrament since that time: whereupon he offered a bill of advocation. See 29 *November* 1678, *Birnie* 21st *July* 1713, Heritors of the Parish of *Abdie*.

The Lords refused to advocate the cause.

N° CXCII.

No. CXCII. *Eodem die.*

David Ramſay Shipmaſter in *Leith* contra *John Balfour.*

Inſolvency of a Partner, upon whom the Loſs lies.

David Ramſay having brought home ſome velvets, by commiſſion, for *Archibald Balfour*, and *Samuel Welſh*, Merchants in *Edinburgh*, they paid him the prime coſt of two thirds thereof, and agreed to give him a third ſhare of the profits, in diſpoſing of the ſame; conform to an obligation, wherein they acknowledge the receipt of the velvets; and that he had paid one third of the price: "Therefore they oblige "themſelves, to hold accompt to him, for the third part of the neat "proceeds of the ſales of ſaid goods, he always running all riſques, ac- "cording to his proportion, in all ſhapes with them." Part of the velvets were given to *Patrick Manderſton* Merchant in *Edinburgh*, to be diſpoſed of for their behoof, and he in his books gives them credit for the ſum of L. 117 Serling, as the proceeds thereof; and marks the ſame on the back of a bill, which *Balfour* and *Welſh* had accepted, payable to *Manderſton*. Shortly after *Samuel Welſh* gave way; whereupon *Ramſay* brought a proceſs againſt *John Balfour*, as repreſenting *Archibald* his brother, to account to him for the third of the neat proceeds of the velvets. The Defence was, That *Archibald Balfour* was not liable for *Welſh*'s inſolvency, and that he, the Defender, was willing to implement *Archibald*'s part, but was not bound to implement what was incumbent on *Welſh*.

Anſwered, That the co-obligants were liable conjunctly, tho' not conjunctly and ſeverally: The effect of which behoved to be, that the one failing, the other was liable in the whole; for without diviſion or ſeparation, they grant receipt for the cargo, and oblige themſelves to hold accompt; which is juſt the ſame as if they had ſaid, we bind ourſelves conjunctly to accompt: And this being fixed, the conſequence is, that *Archibald* was liable *in ſolidum*; both becauſe the performance in this caſe is indiviſible, and alſo becauſe the other co-obligant is bankrupt. The truſt repoſed in *Balfour* and *Welſh* was plainly indiviſible, and the conſequential obligation, to accompt for the proceeds, muſt partake of the nature of the principal obligation. But even ſuppoſing the original obligation diviſible, yet, even there, one of the obligants proving inſolvent, the other is liable *in ſolidum*, becauſe they are bound conjunctly. The goods were delivered to the obligants as Partners, and they were to have the ſole diſpoſal; they could run no riſk by the Purſuer's bankruptcy, as little ought he by the failure of any of them. And as to the clauſe in the obligation, *he running all riſks*, it means no more than ſuch as the obligants ſhould run in common, ſuch as bad debtors, fire, *&c.* which it was moſt reaſonable the Purſuer ſhould run as well as the others, ſince he was to have a third ſhare of the profits. See 14*th June* 1672, *Sutherland*, 16*th December* 1710 *Muſhet. Fountainhall.*

2*dly*, As to the ſeparate point, that the Purſuer's money, *viz.* the 3d part of L. 117 Sterling, was applied to the payment of a bill which *Archibald Balfour* and *Welſh* owed, conjunctly and ſeverally, to *Patrick Manderſton*; this of itſelf made them both liable *in ſolidum*. It came thereby to be *in rem verſam* of them both, and the ſurrogated debt muſt partake of the ſame nature with the debt, in place of which it came.

Replied for *John Balfour*, That the determination of the preſent queſtion did not depend upon the nature of diviſible or indiviſible obligations, or upon any conſequences of perſons being bound conjunctly, or conjunctly and ſeverally, but on the known laws of ſociety; by the nature of which, as each party is to have his ſhare of gain, ſo he muſt bear a proportional part of the loſs, if any be. Therefore, when the ſociety diſſolves by the death or bankruptcy of any of the partners, each is not liable to the other *in ſolidum* for his ſhare; that would be abſurd: But each partner is obliged to give account of his own dealings, and to communicate the profits to the reſt according to their reſpective proportions; and if there be no profit but loſs, he is entitled to demand of the others, that they indemnify him *pro rata*: And this rule takes place, when the loſs happens through the inſolvency of one of the Partners, *l.* 63. §. 5. and *l.* 67. *ff. pro ſocio*; agreeable to which, the Defender is willing to communicate, with the purſuer, what his brother intromitted with belonging to the company: Nay the obligation itſelf declares, that the purſuer was to run all riſks without exception; and conſequently comprehends this of the inſolvency of one of the partners; which indeed it would have done from the nature of the contract, tho' there had been no writing. And as to the ſeparate point, the only rule of judging whether the money applied in payment of the bill, due to *Manderſton*, was *in rem verſam* of *Balfour* or *Welſh*, is to conſider whoſe debt was thereby extinguiſhed? With reſpect to which, it is believed ſeveral perſons may be bound *in ſolidum* for one debt to the creditor; and yet it might not follow, that the whole is the proper debt of any one of the obligants. In the preſent caſe, *Balfour* and *Welſh* were debtors to *Manderſton* by bill; and although he might have demanded payment from either of them, yet the debt ſtill ſubſiſted for the one half againſt the other; he was bound to pay it in all events, and his obligation could not be extinguiſhed, but by his making payment. Now, if the money retained by *Manderſton*, was applied for the one half, to extinguiſh the proper debt of *Welſh*, as it really was, is it not the ſame thing as if *Welſh* had put the money in his pocket? How can it then be ſaid to be *in rem verſam* of *Balfour*, when it was applied to pay the debt of *Welſh*.

The Lords found the Defender liable for the whole.

CXCIII.

CXCIII. *June 16th* 1742.

Hamilton of *Lady-land* Surveyor-General, contra *Robert Boyd, &c.* Skippers in Irvine.

Importation of Iriſh-victual probable by Oath of Party.

IN the proceſs at Mr *Hamilton*'s inſtance againſt the ſaid Skippers for importing Iriſh-victual, the Lords pronounced the following interlocutor: "Find the importation of Iriſh-victual prohibited by act of council, ratified by ſubſequent ſtatutes, competent to be tryed by the judge-ordinary; and find that the limitation of 6 months for trying the offence, as by the ſtatute 1703, does allenarly reſpect the ſuperadded penalty of tranſportation: But find that ſuch importation is not probable by the oath of parties; and therefore, that the offenders cannot be obliged to depone againſt themſelves."

Thereafter the Lords "Found the importation of Iriſh-victual probable by the oath of party." Againſt which laſt Interlocutor the Skippers reclaimed, and *pled*, That all Civilians agree in this propoſition, That *in criminibus ubi pœna corporis afflictiva irrogari poteſt*, the oath of party is an incompetent mean of proof; a rule founded on the principles of juſtice and equity. It is true, in cauſes criminal, parties are obliged to depone, where the puniſhment does not reach beyond pecuniary fines, upon the ſame principle as they are obliged to depone in matters purely civil; but there is no analogy from thence to other criminal caſes, whereupon ſentences of forfeiture, or *pœna corporis afflictiva*, may be impoſed. The rule of the civil law was, *ſanguinem ſuum quoquo modo redimere licere*. And temptation of perjury would be ſo ſtrong, in caſes where ſuch high penalties might be impoſed, the laws of all countries have made this to be a rule; and where expediency made it neceſſary to make an exception in particular caſes, becauſe of the publick intereſt, a ſpecial ſtatute has been thought neceſſary on that account. Neither is there any thing in the ſtatute 1703, which obliges the defender to depone againſt himſelf; for as to the words whereby the crime is made probable *prout de jure*, they ſignify no more, than to be probable as accords of the law, that is, by every competent mean of proof; and the common acceptation of theſe words imports no more than this, to be probable by witneſſes, in oppoſition to a proof by writ or oath of party: Thus in pronouncing acts, or allowing proofs before anſwer, theſe words are never made uſe of, but in order to denote, that the point is probable by witneſſes. See *Faber. in cod. lib.* 4. *tit.* 1 *defin.* 43; *Mathæus de criminibus, tit. de probationibus, cap.* 7. Sir *George Mackenzie* in his criminals, part 2*d. tit.* 25. 38*th* act Parl. 1661.

Pled for the Purſuer, If a loading of meal is taken in *Ireland*, and brought to *Scotland*, how ſhall it be proven? the maſter and all the mariners are, by the law, liable to puniſhment, *et ſocii criminis*; ſo not by their own oaths againſt one another, can they be convicted: If people ſee them land in *Scotland*, which may be eaſily avoided, yet thoſe who ſee them land cannot ſwear from what place the meal was brought; how

how then is it to be proven? If by witneſſes from *Ireland*, how are they to be come at? In ſhort, if the oath of party is not competent, the law may be repealed as uſeleſs. No doubt, there are caſes where a party is not obliged to give his oath; but where the offence is not *inter crimina atrociora*, it is no uncommon thing, to oblige the party to purge himſelf by oath; which is a proceeding far from being againſt natural juſtice, as the perſon is thereby made his own judge, of which he cannot complain. And the only reaſon, why, in all caſes, an oath cannot be adminiſtred is, leſt an occaſion be miniſtred to perjury. The law does not think it hard, that a man ſhould be convicted by oath, more than by writing; for it ſuppoſes, that it is juſt that offences ſhould be diſcovered and puniſhed; and therefore the temper in this matter is modelled by the law itſelf: And it cannot be ſaid to be unjuſt, when neither life nor limb are concern'd, which indeed are great temptations upon a party obliged to depone. And as to the words of the act, declaring the delinquency, may be proven *prout de jure*, it means no more, than a direction to judges to ſuſtain the delinquency probable by all kinds of proofs; and ſuch is the common acceptation, in Interlocutors pronounced every day; and ſo it has been decided, 24 *January* 1712, Juſtices of the Peace of *Air*. Nor is it any objection, that perſons under the degree of heretors, if convicted within ſix months, may be tranſported, and that it would be flagrant to ſuppoſe the delinquency probable by their oaths; becauſe none of the puniſhments in the act touch life, limb, or fame, no more than in the caſes of wood-cutting, or ſtealing bees. And if the law has thought it neceſſary, that they ſhould diſcover, not thoughts, but criminal facts committed by them, they cannot complain. See Lord *Stair lib.* 4. *tit.* 44; *Faber in cod. lib.* 4. *tit.* 1. *Defin.* 43. *l.* 9. § 2 *de jure jurando*; and ſtatute 1703, prohibiting the exportation of Iriſh wool.

The Lords adhered.

CXCIV. *June* 17. 1742.

Competition *Andrew Chalmers* with *John Blair*, &c.

Before what Commiſſar the moveable effects of a defunct fall to be confirmed.

John Blair having moved an edict before the Commiſſaries of *Edinburgh* for decerning him executor *qua* creditor to the deceaſed Mr *Hugh Murray-Kynnynmound*, Advocate; compearance was made for Mr *Chalmers*, who had been decerned executer *qua* creditor to Mr *Murray* before the Commiſſaries of *St Andrews*; and it was objected for him, that there could be no confirmation of Executors before the commiſſaries of *Edinburgh*, but allenarly at *St Andrews*, becauſe although the defunct was a lawyer and pleader before the Lords, yet his principal dwelling-

dwelling-houſe was at *Lochgelly* in *Fife*, which is in the commiſſariot of *St Andrews*; and that for five or ſix years before his death, he had graſs parks and labouring in his own hands, and great works of incloſing his ground, going on at *Lochgelly*, where he had ſervants conſtantly reſiding, and that himſelf and family reſided always there during the ſix vacation months, when his houſe in *Edinburgh* was locked up; therefore, as *Lochgelly* was his chief domicile, the commiſſary of that bounds is he who only can confirm the whole executry.

Anſwered for *John Blair*, That Mr *Murray* laid his account with reſidence at *Edinburgh* during life, where he practiſed as a lawyer; that in that view, he bought and furniſhed a dwelling-houſe in *Edinburgh*, in which he and his family reſided, and where he died. It is true, ſome years before his death, he ſucceeded to the eſtate of *Melgund*, and as there happened to be a country-houſe on part of that eſtate at *Lochgelly*, he gave over a country-houſe he had near *Edinburgh*, and went there ſome part of the vacation; and for his diverſion he poſſibly might take ſome of the parks. However, his firſt reſidence in the proſecution of his buſineſs was ſtill in his houſe in *Edinburgh*, not only during the ſeſſion, but even during a good part of the vacation, he being one of the town's aſſeſſors; ſo that there is no reaſon to think that he had any *animus* or intention to change the *locus domicilii* which he had once deliberately fixed. If the houſe of *Lochgelly* had been the ſeat of an ancient paternal eſtate, in which Mr *Murray* and his forefathers had always reſided, there might have been ſome pretence for conſidering it as his proper domicil, for which, *ratione originis*, he might have had a particular affection; but that was not the caſe. In ſhort, Mr *Murray*'s occaſional reſidence at *Lochgelly* cannot be underſtood *animo remanendi*, but only as a ſort of receſs for amuſement and recreation.

The Lords paſſed Mr Chalmers's *bill of advocation, and remitted to the Commiſſary of* St Andrews *to proceed in the edict of confirmation at the inſtance of the ſaid* John Blair.

N° CXCV. *June* 17. 1742.

Mary Provan, contra *Patrick Calder* and *William Anderſon*.

1 *Granting and depoſiting a bill if probable by witneſſes.* 2 *Whether valid if gratuitous,* 3 *If granted* intuitu matrimonii, *does the bill become void if marriage do not follow.*

MARY PROVAN happening to be in a publick-houſe with *Calder* and *Anderſon*; *Calder* in his cups made love to *Mary*, and, as alledged, propoſed marriage to her, and, upon her expreſſing ſome diffi-

dence of him, as he had formerly deſerted other girls, he, in order to give her aſſurances of his ſincerity, granted her a bill for an L. 100 Sterling; thereby meaning, as ſhe averred, that he ſhould pay the ſame, in caſe he ſhould not fulfil his promiſe of marriage, which bill ſhe gave to *Anderſon*, upon his promiſing, either to return the bill to her when ſhe ſhould call for it, or to pay her the ſum therein contained. *Calder* having reſiled, and likewiſe got back the bill from *Anderſon*, *Mary* brought an action againſt them both, concluding againſt *Anderſon* the depoſitar for exhibition and delivery of the bill, and, in the ſecond place, in caſe of failie, both againſt him and *Calder* for payment. In this proceſs, a proof before anſwer was allowed of what paſſed at the time the bill was granted, and, in conſequence thereof, ſeveral witneſſes were examined.

Pled for *Anderſon*, That he acknowledged the bill was put in his hands, but not with any ſerious purpoſe of being kept for the purſuer: ſo far from it, that, as the whole affair from firſt to laſt, was tranſacted in the way of joke, it was underſtood by every body preſent, that the bill was not to be made uſe of, and that he ought to redeliver the ſame to the granter, which accordingly he did; and that, even ſuppoſing it had been depoſitate in his hands in terms of the libel, he could only be liable in damages, in caſe the bill ſhould be found valid.

And for both the defenders, it was urged, that a bill being granted to the purſuer for an L. 100 Sterling, and put into *Anderſon*'s hands for her behoof, were facts not relevant to be proven by witneſſes; that our law was very jealous of parole evidence, and never admitted the ſame in matters of importance. If the purſuer had libelled a ſpecial *caſus amiſſionis*, or loſt *caſu improviſo*, the neceſſity of the thing muſt have made way for a proof by witneſſes: but if people give truſt, they muſt follow the faith of thoſe they do truſt; and have no reaſon to complain of being denied a proof by witneſſes, when it was in their power to provide themſelves with better evidence. And with reſpect to the fact, that the purſuer truſted *Anderſon* with the bill, it was ſaid to fall under the act 1696 as a ſpecies of truſt, and not probable otherwiſe than by writ or oath. But, granting the facts were true, as alledged by the purſuer, the bill is gratuitous, and ſo not binding, as decided December 3d 1736, *Weir*. A promiſe of marriage, which one is at liberty to retract next moment, may be the impulſive cauſe to make a deed; but ſurely it will never be underſtood an onerous cauſe, to make the deed be conſidered any thing elſe than as a donation. Laſtly, the bill was granted *intuitu matrimonii*, and conſequently muſt fall to the ground, as *cauſa data, cauſa non ſecuta*, ſince marriage has not followed; and it can never be ſupported on the ſuppoſition that it was only a penalty upon *Calder*, to be forfeited, in caſe he refuſed to implement the marriage, as penal ſtipulations cannot be conſtitute in the ſhape of a bill; A promiſe of marriage, under a penalty, is not effectual, more for the penalty than for the marriage itſelf; there is *locus poenitentiæ* with regard to both. *l. 5. in fine, C. de ſponſal.* 21. January 1715, *Young*.

Anſwered for the Purſuer, That there is nothing more frequent in our law, than to ſuſtain a proof by witneſſes, where the queſtion is concerning

cerning the tenor of writs of importance; and that all lawyers agree in this, that *chirographum apud debitorem repertum*, is only a presumption which may be defeated by circumstances; amongst which this one, If the writ was not given up by the creditor, but came into the debitor's hands in an unwarrantable way, as Lord *Stair* observes in several places. And as to the point, whether the depositation in *Anderson*'s hands is a thing likewise probable by witnesses, the pursuer believes it is a general rule, that the delivery or receipt of moveables, of whatsoever kind, is probable by witnesses, with one exception, the borrowing or receiving of current money, which can only be proved by writ or oath of party. Upon this principle it is, that, in actions of exhibition and delivery, the having of writs of the greatest importance is probable by witnesses; see 14th February 1629, *Farquhar*. And as to the observation, that the depositation in *Anderson*'s hands is a species of trust, and therefore not probable by witnesses since the act 1696, it could have no weight; since that act has hitherto been understood only to take place where writs and securities are taken in the name of one person in trust, and for the behoof of another. It was likewise observed, that there was no evidence in the present case, tending to show the bill in question was granted in joke; nay, that the very contrary appeared from the evidence of two witnesses who were present. And as to the objection, that a donation could not be constituted by way of bill, it was answered, That though it has been found, that donations *mortis causa* cannot be constitute by way of bill, yet the decisions do not at all apply to a *donatio inter vivos*, which is the present case; for the reason why a *donatio mortis causa* is not good by way of a bill, is because it implies a *tractum futuri temporis*, which is inconsistent with the nature of a bill, which does not apply to a *donatio inter vivos*: But in fact it was granted for a truely onerous cause, *viz.* The pursuer's consent and promise to marry the defender *Calder*, which was promising to make over herself and effects to her husband; and if that is not onerous, nothing surely can be so; neither is it a clear point, that such a promise may be resiled from; but if it could, it brings the party obliged at least under a natural obligation to perform, and which, of itself, it is thought is a sufficient onerous cause. Neither is it true that the bill was granted *intuitu matrimonii*; on the contrary, from the whole circumstances of the case, it appears to have been intended to take place in the event no marriage followed; for in case the defender had implemented his promise, the bill would have fallen back to himself *jure mariti*. In a word, the true cause of granting it was to induce the pursuer to accept of the proposal; and as she did accordingly accept of *Calder*'s proposal, it can never be said that the bill was either granted *sine causa*, or that it is in the case of *causa data non secuta*.

The Lords sustained the defence and assoilzied.

But, upon a reclaiming petition and answers, "The Lords repelled "the defence, and found the defenders, conjunctly and severally, liable "to the pursuer for the L. 100 Sterling."

N° CXCVI.

No CXCVI. *Eodem die.*

John Alexander and *Mary Hill*, contra *Margaret Scot* and *John Wilſon* her Husband.

A bill is good, though directed to one as principal, and to others as cautioners.

ANDREW LANG drew a bill upon *Thomas Scot*, directed to him as principal, and three others as cautioners, conjunctly and ſeverally: All the four accepted; and, thereafter, *Lang* indorſed the bill to two of the cautioners; upon which theſe two indorſees brought an action againſt *Margaret Scot*, as repreſenting her brother *Thomas Scot*, who was bound in the bill as principal.

Objected, That bills were originally introduced into the practice of nations, for the utility of commerce; and, in that view, were indulged with extraordinary privileges; that they had received a determinate form, conſiſting allenarly of the order to pay the ſum therein contained, and the acceptance of that order; ſo that every other obligation deviſed in the form of a bill, and every clauſe in ſuch writing, contrary to the proper form, or inconſiſtent with the nature thereof, have been deemed ſufficient to vacate that writing, as being no longer of the proper tenor and nature of a bill. Upon theſe principles it has been found, that nothing is the proper ſubject of a bill but money, and that an obligation, in that form, to deliver a fungible, is not valid. This, and many other inſtances that could be mentioned, ſhows, that the law does not ſupport obligations foreign to the nature of bills. In the preſent caſe, the obligation upon the acceptors is conſtitute in the form of a ſecurity, by principal and cautioners, which is as foreign to the proper form of a bill, as any thing can well be. If practices of this kind were encouraged, there is no ſort of obligation which might not be tranſmographied into the form of a bill. 2*dly*, ſuppoſing the bill not totally void, yet the direction to one as principal, and the reſt as cautioners, ought not to be regarded, ſo far as concerns theſe qualities; and conſequently the defenders can only be liable for one fourth of the bill, as if they had all ſimply accepted the ſame.

Anſwered. Bills drawn upon ſeveral perſons frequently bear that the effects were delivered to one of them, which conſtitutes that one principal debitor; and there does not appear to be any difference betwixt a bill of that draught, and a bill in a ſimple form, without mentioning to whom the value is delivered, but with a direction to one of the perſons as principal, and to the others as cautioners. The direction qualifies the acceptance; and if one ſhould accept in caſe the effects come to his hand, or payable at a further-day than that mentioned in the bill, the qualified acceptance is good, and affects the bill; the creditor, by admitting

admitting ſuch quality, is underſtood to conſent, and is thereby tied down to the qualities. And much more will the accepter be bound by the terms of the direction, that being a matter purely among themſelves, to which they agree by their acceptance adhibit. See 21ſt July 1735, *William M'Whirtor.*

And as to the ſecond, *anſwered*, That qualified acceptances are ordinary in bills, and why the quality may not be inſert in the direction, as well as ſubjoined to the acceptance, is hard to conceive.

The Lords repelled the nullity objected to the bill purſued on.

N° CXCVII. *June* 22. 1742.

Competition *Robert Carmichael*, with *Anna Moſman*, relict of *William Hardie.*

1. Can an arreſtment be carried into execution by a proceſs of forthcoming raiſed after the death of the principal debitor? 2. Is an arreſtment good in the hands of an aſſigney before he receive payment for the ſuperplus over paying himſelf?

THE deceaſt *William Hardie* being creditor by bill to *M'Kenzie* of *Roſend* in the ſum of L. 44 Sterling, he conveyed the ſame to *George Moſman* and *John Paton*, for relief of certain engagements they had come under for him. And being relieved, they, with *Hardie*'s conſent, aſſigned the debt to the Bank of *Scotland*, to whom *Hardie* had become debitor in the ſum of L. 30, 5 s. Sterling. Mr *Carmichael*, a creditor of *Hardie*'s in the ſum of L. 20 Sterling, uſed arreſtment in the hands of Mr *David Drummond* Treaſurer of the Bank upon the firſt of April 1732. In February 1736, *Hardie* died, and in the Auguſt thereafter, *Carmichael* brought an action of forthcoming againſt the Governor and Company of the ſaid Bank. The Bank received payment of *Roſend*'s debt on the June 8. 1739 with the intereſt due thereon, and on the 17th July thereafter Mrs *Hardie* confirmed as executor-creditor to her huſband, the ſuperplus money in the Bank's hands, after paying their own debt; and objected to *Carmichael*'s arreſtment, that it could not be carried into execution by a proceſs brought after the death of the principal debitor. 2*dly*, That the arreſtment in the hands of the Bank was inept; for that, at the time of the arreſtment, it was not debitor to Mr *Hardie*. It is true, that it became debitor thereafter in a liquid ſum; but as the arreſtment did not affect *acquirenda*, this after-debt could not be affected by the prior arreſtment. Suppoſe the Bank had by the aſſignation been bound, betwixt and a day certain, to do diligence upon the debt aſſigned, or to denude; yet ſuch an obligation could not be arreſted, nor be made the

ſubject of a forthcoming, becauſe it was not commenſurable with a liquid ſum of money.

Anſwered, That *Roſend*'s debt was conveyed to the Governor and company of the Bank, and to *Drummond* their Treaſurer, for their uſe and behoof; ſo that *Hardie* was fully denuded; and though *Drummond* might be accountable to him for the contents of this bill, after payment of the debt due by *Hardie* to the Bank, yet the right was fully eſtabliſhed in *Drummond*. The queſtion therefore muſt be conſidered in the ſame light, as if *Drummond* had given his obligation to *Hardie* to account and pay over to him ſo much of *Roſend*'s debt as he ſhould recover, more than would ſatisfy what was due by *Hardie* to the Bank; which obligation, however uncertain, *quoad* the extent, or as depending upon an uncertain condition, muſt have conſtitute a *jus crediti* in favours of *Hardie*, which his creditors might affect; and as no other method is known in law, whereby the ſame could have been reached, but by an arreſtment, it is believed the arreſter falls to be preferred.

It is believed the Lords found the arreſtment did not fall by the death of the common debitor, and that they preferred the executor confirmed to the arreſter.

No. CXCVIII. *June* 23. 1742.

Competition *Wallace* of *Cairnhill*, with Colonel *Dalrymple*.

A ſaſine is void proceeding on a precept to infeft in lands, as the ſame are particularly enumerate in the debitor's rights.

IN the proceſs of mails and duties at *Cairnhill*'s inſtance, againſt *Robert Dalrymple* of *Kelloch*, and his tenants, compearance was made for the Colonel, who produced an heritable bond, granted to him by *Robert Dalrymple*, with ſaſine thereon.

Pled for *Cairnhill*, That in ſo far as the heritable bond contained an obligation to infeft the Colonel in his lands of *Kelloch*, he yielded preference to the Colonel; but objected thereto, in ſo far as it contained an obligation to infeft him *forth of all and ſundry the ſaid* Robert *his other lands, of whatever name and deſignation the ſame be of, pertaining and belonging to him, and lying within the Sheriffdom of* Air, *as the ſame are particularly enumerate and mentioned in the ſaid Mr* Robert Dalrymple *his own, and his predeceſſors and authors their rights and infeftments of the ſame.* In ſupport of the objection, it was urged, that the ſaſine was null, upon the head of uncertainty, as it did not appear from it, without looking into the

the common debitor's titles of the lands, whether the ſame was *rite* deduced, and as an *actus legittimus*, it ought to be compleat in itſelf, without any dubiety; nor can it ever be effectual in law, if it needs to be explained or ſupported by production of other deeds. What fatal effects ſuch a ſaſine, if valid, would produce, with regard to our records, is obvious. It behoved to put all the lands therein mentioned *extra commercium*, when perhaps none of them belong to the common debitor. This, inſtead of clearing up to the lieges what lands are incumbered, and what are free, the only deſign of the records, tends to the direct contrary.

Pled for the Colonel, That his ſaſine was regularly taken in all the lands contained in his author's infeftment, enumerate in the preciſe terms thereof; and that, in conſequence of a proceſs and decreet of poinding the ground, he had been in poſſeſſion conform for near 20 years: That, by our ancient feudal cuſtoms, poſſeſſion alone was ſufficient for charter and ſaſine, and ſtill it removes any ſuſpicion, that the Colonel was graſping at an infeftment larger than his right: the heritable bond was granted at *London*, where the debitor had not the rights of his lands, and it was impoſſible to carry in one's memory the names and deſcriptions of the particular ſmall mailings: *Kelloch* the principal is mentioned, and it is pertinents, and reference is had to the debitor's infeftment for the particular enumeration of the reſt; and, as ſoon as the bond was brought to *Scotland*, ſaſine was taken thereon, in terms of the debitor's infeftment.

The Lords ſuſtained the objection againſt Colonel Dalrymple's *ſaſine as to all lands not ſpecially named in the precept.*

No CXCIX. *June* 25. 1742.

Competition Earl of *Aberdeen* with *William Duncan*.

A reſignation made by any other ſymbol than ſtaff and baſton, is void.

IN the mails and duties at the Earl's inſtance, for the rents of certain tenements in *Aberdeen*, which originally pertained to *John Anderſon*, common author to both parties, compeared *William Duncan* who had purchaſed an annualrent-right on the ſaid tenements, and craved to be preferred on his prior infeftment.

Objected, The title under which *Duncan* claims a preference, is void, in ſo far as the reſignation in the hands of the Magiſtrates of *Aberdeen* was not made by the uſual and cuſtomary ſymbols allowed of by the law and practice of this Kingdom.

Anſwered,

Anſwered, By the nature of the thing itſelf, nothing is more indifferent than what ſhall be the ſymboll uſed in a reſignation; if the form of reſignation be actually adhibited upon a proper warrant, and thereupon a new inveſtiture given to the purchaſer, and the ſaſine recorded, every thing is done material for conſtituting the right, and publiſhing the ſame to the lieges. The ſymbol uſed in this caſe, of a penny uttol, has been very ancient, and ſo common in that burgh, that all the reſignations ſince the 1708 (except 16) have been made by that ſymbol, as appears from a certificate of the Town-clerk's. The act of ſederunt 1708, which diſcharges the uſing any other ſymbols in reſignations except ſtaff and baſton, reſpects only reſignations of lands, and not annualrent-rights. See *Craig, tit. de reſig.* § 8.

Replied, That it ſurely was originally matter of indifference what ſymbols the law injoined to be uſed; ſuch things being in their own nature quite arbitrary: but when once aſcertained by law or practice, becomes matter of conſequence, that the ſame ſhould not be variable. Therefore it is, that the law has aſcertained the different ſymbols that are to be uſed in different caſes, according to circumſtances, as it is by tradition only *quod dominia rerum tranſferuntur*. Where a vaſſal is to be infeft, the *traditio poſſeſſionis* muſt be upon the ground of the lands; But as there cannot properly be a *traditio* of the lands themſelves, the law has allowed of a ſymbolical tradition, by delivery of earth and ſtone, part of thoſe very lands whereof the property is meant to be transferred; whereas, when the lands are to be ſurrendered to the ſuperior, as ſuch reſignation might be made at any place, the ſymbols to be uſed in redelivering the poſſeſſion could not be *partes ſoli*; and therefore the law did pitch on ſtaff and baſton as the general ſymbols to be uſed in all ſuch caſes. Nor does it make any difference whether the reſignation is made in order to renounce or tranſmit a right of property, or only an annualrent; becauſe even in the laſt caſe, it is the lands themſelves that are reſigned: in virtue of which only, the ſuperior is enabled to grant the infeftment of annualrent, and is *in favorem* as much as the property were to be transferred, though to a more limited effect. The act of ſederunt is expreſs, which indeed is only declaratory of what was law before that period; and whatever indulgence might be given to an erroneous practice in a queſtion with the debitor himſelf, it would be againſt all law to validate theſe reſignations in competition with third parties, onerous purchaſers, or creditors, who are intitled to the benefit of every legal exception that is competent againſt the right which is ſet up in competition. See *2d December* 1729. *Carnegie.*

The Lords ſuſtained the objection, that the reſignation was not made with the lawful ſymbols of ſtaff and baſton, in terms of the act of ſederunt.

No CC.

N° CC. *June* 29. 1742.

John &c. *Wrights*, contra Enſign *Lumſden*.

A Maſter can reclaim an Apprentice if he enliſts.

ENSIGN *Lumſden*, having enliſted *George Clark*, *John Wright* claimed him as his apprentice, conform to indentures produced. The Juſtices of Peace declared *Clark* free from his Majeſty's ſervice, and that he belonged to *John Wright* his maſter: Whereupon Enſign *Lumſden* offered a bill of ſuſpenſion, and *Pled*, That there was no expreſs ſtatute prohibiting the enliſting apprentices; that there was nothing in an indenture, to give it a preference, in that particular, to every other contract. It is no more than a contract in writing; and yet it was never pretended, that any other contract, verbal or in writing, did afford the creditor in ſuch contract a right to claim his party from his Majeſty's ſervice. It was never alledged, That an hired ſervant, if enliſted, could be claimed by his maſter; yet he is as much under contract as an apprentice; with this difference, that the term of his ſervice is generally ſhorter. If one was bound, by charter-party, to perform a voyage, this would not give the merchant a right to claim ſuch man from the ſervice, for this good reaſon, That there is no exception or exemption of perſons in the acts of mutiny and deſertion. See act *anno* 12*mo*, *Annae reginae*.

For the maſter it was urged, That the queſtion is here about the power a perſon has of enliſting himſelf voluntarily; the King's prerogative has no concern in that matter; it muſt depend on the power one has over himſelf; and none can be a volunteer, unleſs he is at his own diſpoſal: and therefore, to encourage ſuch people to enter into the ſervice, they are to receive L. 4 Sterling, as a premium, or enliſting money, by acts made in Queen *Ann*'s time. And by none of the recruiting acts made in that reign, were they in force, as they are not, could *George Clark* be preſſed into the ſervice. It would ſeem abſurd therefore, that the will of him, who is not at his own diſpoſal, but is a bound apprentice, ſhould liberate him from his maſter's ſervice.

The Lords refuſed the bill of ſuſpenſion.

Nº CCI. *Eodem die.*

Mrs *Ann Burnet* contra *Patrick Middleton.*

Septennial preſcription of the act 1695.

ROBERT BANNERMAN and *Patrick Middleton* granted bond in January 1733 to *Gilbert Burnet* for L. 80 Sterling of the following tenor: "I *Robert Bannerman, &c.* grants me to have borrow-"ed and received from *Gilbert Burnet, &c.* all and hail the ſum of L. 80 "Sterling, whereof I grant the receipt, *&c.* which ſum, with the annual-"rents, *&c.* I the ſaid *Robert Bannerman*, and with me Mr *Patrick* "*Middleton &c.* bind and oblige us, conjunctly and ſeverally, our heirs, "*&c.* to content and pay to the ſaid *Gilbert Burnet, &c.*" Mrs *Ann Burnet*, as executrix to *Gilbert* her father, brought an action for payment againſt *Patrick Middleton*, as repreſenting *Patrick Middleton*, one of the obligants in the bond.

The defence was founded on the 5th act, *Parl.* 1695, which ordains, "That no man binding and engaging for hereafter, for and with another, "conjunctly and ſeverally, in any bond or contract for ſums of money, "ſhall be bound for the ſaid ſums, for longer than 7 years after the date "of the bond, *&c.* In terms of this clauſe, the defender ſubſumed, "that his predeceſſor was bound for and with Mr *Bannerman* conjunctly and ſeverally, in a bond for a ſum of money; that the 7 years are elapſed, and therefore his predeceſſor became thereby *eo ipſo* free. Neither can the following clauſe in the act, vary the queſtion, declaring, "That whoever is bound for another, either as expreſs cautioner, or as "principal, or coprincipal, ſhall be underſtood to be a cautioner to have "the benefit of this act, providing that he hath either clauſe of relief "in the bond, or a bond of relief apart intimate perſonally to the "creditor at his receiving of the bond."

The defence therefore falls to be ſuſtained on the firſt clauſe, unleſs the purſuer make out that it is reſtricted by the latter clauſe. But when the whole is conſidered, it will appear the laſt was intended as an extenſion, not as an alteration or reſtriction of the former. The act proceeds on the narrative of the ruin brought on families, by men's engaging as cautioners; with reſpect to which, it is evident the form of the deed is of no manner of conſequence, *viz.* Whether one is bound as cautioner, or has a bond of relief, or in whatever other manner the ſecurity is conceived; the ſubſtantial matter is, who has got the money, and who has furniſhed his credit? If the ſecurity is ſo conceived as this muſt be known to the creditor, ſo as to put him on his guard againſt the preſcription, the caſe comes fully up to the narrative of the act.

act. *One bound for and with another, conjunctly and ſeverally*, is as well entitled to the remedy as any one. *Ex facie* of the bond, it appears that he is cautioner, becauſe he is bound for another, who is declared to have received the money. This muſt put the creditor as much on his guard, as where there is a clauſe of relief, or bond of relief apart, intimated to him. The act does not ſay, that the cautioners deſcribed in the laſt clauſe, and theſe only, ſhall have the benefit: This would be contradicting the former clauſe, giving the benefit to a cautioner, bound for and with another conjunctly and ſeverally: Surely it would have a ſtrange appearance, that a ſtatute, introduced for the benefit of cautioners, ſhould not take place, in the caſe of him who is, in the moſt proper ſenſe, a cautioner. 2*dly*, Suppoſing the remedy provided in the act, were to be confined to the forms mentioned in the latter clauſe, the defender pleads, That his caſe falls under one of the branches thereof; his predeceſſor being bound as expreſs cautioner. It is true, the word *Cautioner* is not in the bond; but, as there is no charm in the word *Cautioner*, it is not to be ſuppoſed, the remedy will be confined to the Word, and not to the Thing. The words *fidejuſſor*, or *ſurety*, would ſurely give a title to the benefit of the ſtatute: and nothing is plainer, than that Mr *Middleton*'s engagement is as cautioner only. *Bannerman* borrowed and received the money, and *Middleton* became bound, not only with, but for him; ſo that no doubt can remain he was really a cautioner, though not deſigned as ſuch.

Anſwered for the Purſuer, That, after the firſt clauſe, the act proceeds to determine who ſhall be underſtood to be a cautioner, to have the benefit thereof; as to which, one of two things are ſpecially required; either, that he have a clauſe of relief in the bond, or a bond of relief apart, intimate perſonally to the creditor. So that the ſubſtance of the ſtatute reſolves into theſe two propoſitions, *viz.* That a cautioner, bound for and with another, ſhall be free from his obligation after 7 years. 2*dly*, That ſuch ſhall be underſtood to be cautioners, who have either a clauſe of relief, or bond of relief apart intimated: The meaning of which is obvious; that the creditor muſt be duely certified of the character under which the party became bound, at the time of contracting the debt. And this is not left to arguments and conjectures; as two certain and viſible ſigns are fixed upon, one or other of which muſt neceſſarily be adhibite, otherways the remedy cannot have effect. It is a correctory law, and therefore not to be extended, by analogy, to ſimilar caſes. And as to the argument, That *Bannerman* received the money, and *Middleton* bound with him in the payment, and therefore free by lapſe of time; it was *Anſwered*, That this was ſeparating one part of the act from the reſt; which is plainly one propoſition, whereof the *firſt part* is governed by the *ſecond*, provided, *&c.* Nay the defender cannot even ſubſume, in the terms of his own explication; for, according to his doctrine, the party pretending to be a cautioner only muſt be bound for and with another; and the ſtrength lies in the firſt of theſe; as it is only being bound for another, that can make a

cautioner;

cautioner; and yet this word, which is assumed in the argument, is not to be found in the bond. Surely being bound with another, is, of itself, no mark of a cautioner. And, if the question were betwixt the parties themselves, who are bound in the bond, the manner in which it is conceived would not, by itself, be sufficient to intitle the one to a total relief against the other: For the fact might have been, that *Bannerman* got the money to be employed for the use of the other; or, if he had intended to make him a present of it (which may be presumed, as there is no clause of relief) in either of these cases, the bond for the creditors security, would have been properly conceived in the terms as it now stands; yet no relief would have been competent to the one against the other; see 9th February 1716, *Rutherford*, 14th February 1727, *Bell*.

The Lords repelled the defence founded on the septennial prescription.

N° CCII. *July* 13. 1742.

Richard Johnston of *Eastfield*, charger, contra *Allan Lockhart* of *Cleghorn*, Suspender.

An entail containing a prohibition to alienate, not duly recorded, its effect.

THE deceast *Richard Johnston* disponed his lands of *Eastfield* to the charger his son, *&c.* under certain reservations, provisions, and restrictions; and the disposition further contained this proviso, "That it should not be lawful to the said *Richard Johnston* the "disponee, to sell or dispone the said lands, to grant heritable or irredeemable securities thereof, to contract debts thereupon, to grant "obligations, or do any other deed civil or criminal, for which the "said lands, or any part thereof, may be burdened or affected, evicted, "forfeited, or adjudged: which haill dispositions, securities, debts, "deeds and crimes, and every one of them, are hereby declared, *ipso* "*facto*, void and null, and the said lands no wise subject thereto, *&c.*" The disposition contained procuratory and precept, in virtue whereof the charger was infeft under the foresaid prohibitions and irritant clauses, specially ingrossed in his infeftment. But the Tailzie was not recorded in the register of Tailzies, neither did it contain any clause irritating the contraveener's right.

These lands being incumbered with debts mostly of the father's contracting, the charger entered into a minute of sale with the suspender, who, upon looking into the title-deeds, refused to implement the bargain; and being charged on the minute, he suspended on this ground, That he was not safe to purchase, as the same was liable to be declared void and null, in consequence of the prohibitory and irritant clause contained *in græmio* of the disponer's right.

Answered for the charger, That this Tailzie was never recorded in the proper register, as directed by the Statute 1685; therefore it could have no force or effect of annulling any disposition granted to third parties. 2*dly*, It contained no clause irritating the right of the contraveener.

Replied, It was implied in the nature of all sales, that the seller must make good his title and power to dispone before he could grant a valid disposition to the purchaser, upon which he could rely as a security; that however

however a *bona fide* purchaſer might be ſecure, who had purchaſed upon the faith of the publick law, ſeeing that his author was not bound up by any entail duly recorded, nor by any clauſe in the infeftment itſelf, and in that view had compleated his titles, and paid the money, ere any diſcovery was made of the defect of powers; yet whereas, in the preſent caſe, the diſcovery was made of this objection before the right was compleated, or price paid, he could not now be obliged to implement under the feaſable right of an after-challenge from the heirs of entail, eſpecially as that queſtion could not be tried in the preſent proceſs of ſuſpenſion, the heirs of entail not being parties to this ſuit.

Anſwered to the 2*d*, That the Statute has no where enacted, that the contraveener's right muſt be annulled, in order to make good the prohibitory clauſes; the contraveener's right may be annulled, and the right of creditors ſecured, and ſo *vice verſa*: It is the will of the donor, of which the creditor is duly certiorate, that has the legal effect of vacating his ſecurity. But whatever may be in this, were the queſtion here with an heir of entail, yet where it is only with the diſponer himſelf, it is believed a purchaſer ought not to be obliged to ſtand the the chance of any after challenge, where the diſcovery has been timeouſly made.

The Lords found the ſuſpender was not bound to accept of the bargain, and therefore ſuſpended the letters ſimpliciter.

No. CCIII. 21ſt *July* 1742

Competition, *William Bruce*, &c. Creditors of Bailie *Hays*, with Mrs *Margaret Scot*, Relict of *William Hay*.

If a Bond granted to a conjunct Perſon, can come in pari paſſu *with onerous Creditors?*

BAILIE *Hay*'s affairs having gone into diſorder, he diſponed his heritable and moveable eſtate to a truſtee, who, having ſold his heritable ſubjects, his onerous creditors craved to be preferred on the price to *Margaret Scot*, who had been married to the Bailie's Son, and to whom the Bailie granted a liferent-annuity of 1200 merks, 23d May 1738, to commence at the firſt legal term after her huſband's deceaſe, upon a narrative, "That there had been no marriage-articles between her and his "ſon; and that he wanted to prevent all queſtions which might ariſe, "if ſhe ſurvive his ſon; and that he had conſidered the circumſtances "of his worldly affairs; which obligation, he declares to be in full ſatiſ-"faction of all terce, *&c.*"

The creditors *urged*, That the Bailie's funds were not ſufficient to pay his onerous debts; ſo the queſtion was, Whether they who were onerous creditors ſhould be firſt paid, or if Mrs *Scot*'s debt, which is gratuitous, is to be ranked *pari paſſu* with them? It was likewiſe ſaid, that the Bailie had not 1200 merks a-year to live upon himſelf; and if this relict, who brought no portion, was inſiſting againſt him, he would have the *beneficium competentiae*; and if the granter would have a good exception againſt payment of at leaſt a part of it, that is a demonſtration that ſuch gratuitous creditor can never come in *pari paſſu* with the Bailie's onerous creditors, who are entitled to the utmoſt farthing, tho' their debtor ſhould

be reduced to abſolute poverty. Beſides, it is obvious what dangerous conſequences would attend the ſuſtaining latent and gratuitous deeds in favours of conjunct perſons, ſo as to bring them in *pari paſſu* with onerous debts; if a loſs is to be ſuſtained *ex eventu*, it is juſter the ſame ſhould fall on the conjunct perſon, who has only a gratuitous gift, than upon ſtrangers who have become creditors *ex cauſa oneroſa*; ſee 12th February 1669, *Pot.* 10th February 1665, Lady *Greenhead. Voet. lib.* 42. *tit.* 8. § 5.

Anſwered for the relict, That, at the time of granting this annuity, the Bailie had ſufficient funds both to anſwer that purpoſe, and likewiſe for himſelf; ſo that, if his affairs are in diſorder, it muſt have ariſen from contractions after that period, which is ſufficient to ſuſtain her bond, even ſuppoſing it were to be conſidered in the eye of law as gratuitous; for, it is only upon the fraudulency of a perſon's gifting away his effects to a conjunct perſon, in diſappointment of his anterior lawful creditors, that they could be heard to plead; and there is no fraud, if at the time there was ſufficiency of effects to anſwer all the debts, and the donations likewiſe. But ſo far is it from being gratuitous, that it is truly onerous, as every huſband is bound to provide for his wife; and if he neglects it, the law takes care to provide her. Nor does it make any difference that it was not her huſband, but his father, who granted the bond, ſeeing he did it, as appears from the narrative, to avoid all after-queſtions; and, by a proviſo therein, he bound her, by her acceptance, to renounce all her legal proviſions: ſo that here was a direct tranſaction, whereby, in place of legal proviſions, the relict was to take herſelf to this ſtipulate annuity, which made her reſt ſatisfied, and neither aſk her huſband to make any ſettlements upon her, nor enquire what ſubjects might have belonged to him; and tho' it may be conſidered as gratuitous with reſpect to the Bailie, yet it is onerous *quoad* her. Thus cautionry obligations, tho' *quoad* the debtor, they be gratuitous, yet are onerous *quoad* the creditor.

The Lords, in reſpect it was admitted by the Procurator for the creditors, that Bailie Hay *had a ſufficient free eſtate at the date of the bond, ſuſtained the ſame.*

No. CCIV. *Eodem die.*

Alexander Stirling contra *John Cameron.*

Whether an heir is to make up a title to a ſubject by a general or ſpecial ſervice?

THE ſaid *Alexander Stirling* being charged to enter heir in general to the deceaſed *John Stirling*, for payment of the debts due by him to his creditors, and having renounced, as judging the debts did exceed the value of the eſtate, the creditors thereupon obtained decreets *cognitionis cauſa*, againſt *Alexander*, and adjudged the eſtate of *John*; and having obtained poſſeſſion, they raiſed a proceſs of ranking and ſale, and when the

the day of the roup came, ſeveral offerers appeared, who offered a much higher price than what was put upon it by the Lords, and far exceeding the debts due to the creditors. *John Cameron* was preferred, and, upon his finding caution, a decreet of ſale was extracted in his favours; whereupon *Alexander* was ſerved and retoured heir in general to *John Stirling*; and, on that title, claimed a right to the ſuperplus price of the ſaid lands, more than what was paid to the creditors; and that the bond of cautionry, given for the price of the lands, might be appointed to be regiſtrated, and an extract thereof given to him, in order to his recovering the remainder price of the purchaſe.

Anſwered for the purchaſer, That the bond was granted for payment of the price to the creditors of *John Stirling*, as found to have right thereto; and, as the purchaſer has paid part of the debts, he is ready to pay the ſuperplus price to whom the Lords ſhall find to have right thereto, after the extent thereof is determined by a ſcheme of diviſion; and, in no event could ſummary diligence be uſed on the bond, which is only granted for payment of the price to the creditors ranked, but a previous ſentence muſt preceed any diligence, determining the extent of the balance, and what perſon had right thereto. *Laſtly*, *Alexander*'s title being only a general ſervice, founds no right to the price of the lands, wherein his predeceſſor ſtood infeft at his death.

Replied, There was no need of a ſcheme, ſeeing the balance would eaſily appear after deduction of the debts paid to the creditors who are ranked. And as to the objection to the title, it was ſaid, that a general ſervice is the known method of making up titles to ſubjects which fall to heirs, and to the taking up of which, it is not neceſſary that infeftment ſhould paſs, and which indeed cannot apply to the ſum in queſtion. It would ſeem abſurd to make up a title by infeftment to land, in order to carry a ſum of money, eſpecially when the lands are already ſold, and of which no part either does, or can belong to the perſon making up the title; and if the purchaſer were infeft, (which he may do immediately) it would be impoſſible for the heir to make up a title to the lands, ſeeing the fee would then be full.

Duplied, In making up titles from the dead to the living, the only period to be conſidered in judging of the ſtate of the effects, is the time of the defunct's death; what happens afterwards, has no influence on this point; if the right was then heritable or moveable, tho' by any after-accident it ſhould change its nature, and become different from what it was before, yet the title muſt be made up according to the nature of the ſubject, as it ſtood at the death of the proprietor. And the ſame way in the queſtion, Whether a general or ſpecial ſervice is the proper title? as that depends upon the right being cloathed with infeftment, or not *tempus mortis defuncti inſpiciendum eſt*, and no other period. For inſtance, ſuppoſe a defunct died infeft in a wadſet-right, and after his death, an order and declarator of redemption is uſed, tho' the wadſet-right is by this declarator turned into money, yet the money will belong, not to the executor, but to the heir, becauſe the right was heritable when the predeceſſor died; ſee 18th June 1675, Laird of *Leys*.

The Lords found, That the heir muſt make up a real right to the lands.

No. CCV.

No. CCV. *July* 27. 1742.

William Jack, &c. contra *John Lauder*.

Whether a teſtator's receiving payment of a bill, which he had bequeathed to certain perſons, is a revocation of the legacies?

THE deceaſed *Hugh Kennedy* diſponed his heritable and moveable effects to the ſaid *John Lauder*, and, of the ſame date with the diſpoſition, he made a codicil, wherein, in caſe of his death, he deſires that Bailie *Muirhead*'s L. 40 bill may be diſpoſed of as follows, *viz.* to *William Jack* L. 10 Sterling, and to three other perſons named, each L. 10. Some days after the date of the codicil, he received payment of the ſaid L. 40 bill, and before he died, he incloſed the codicil in a piece of paper, and directed it thus, *Hugh Kennedy, his will and diſpoſition, not to be opened; but, in caſe of his death, to be opened by Major* Roberton. After *Hugh Kennedy*'s death, *Margaret Burns*, in whoſe houſe he ſtaid, and died, and who had the keys of his repoſitories, gave the foreſaid packet to Major *Roberton*, and with it L. 29 to defray the expence of the teſtator's funerals, which ſum, he, in the codicil, deſired might be laid out thereon, and that the Major would take the direction and overſight thereof, and for which L. 29, the Major granted his receipt to *Margaret Burns*, to account to her and all others concerned.

William Jack, and the three other legatees, brought a proceſs, both againſt the Major, and *Margaret Burns*, againſt the firſt, on his receipt for the L. 29, and againſt *Margaret*, not only for that L. 29, but likewiſe for the remaining L. 11, as being the L. 40 contained in *Muirhead*'s bill, and intruſted to her keeping by *Hugh Kennedy*, and which, being referred to her oath, ſhe deponed, That ſhe ſaw Bailie *Muirhead*'s relict pay the L. 40 bill to Mr *Kennedy*, and that ſoon thereafter, he took L. 40 out of his trunk, which he told her was the money he had received in payment of the ſaid bill, and which L. 40 he delivered to the deponent with the codicil, ordering her to keep the ſame till he died, and then to deliver it to Major *Robertſon*, in order that he might diſtribute that money among the legatees, as directed by the codicil: That accordingly ſhe did deliver the codicil to the Major, with L. 29 upon his receipt produced. During the dependence of this action, the four legatees brought another proceſs againſt *John Lauder* for payment of the L. 29, as being liable to the defunct's funerals, which had been defrayed by part of the ſaid L. 40 legated to them.

The defences for *John Lauder* were, That the diſpoſition from the defunct to him, gave him a right to all lying-money that the defunct either then had, or ſhould have at his death; conſequently it gave him a right to the L. 40 in *Margaret Burns*'s cuſtody; and that the defunct's taking payment of Bailie *Muirhead*'s bill, imported not only a revocation of the legacy, but an extinction of it, the bill which was the ſubject of the legacy, no longer exiſting; ſo that the legatees could enter no claim thereon, as is eſtabliſhed § 21. *Inſt de legat.* and, as the defender's right to the

the defunct's lying money was eſtabliſhed by writ, nothing leſs than the defunct's will to the contrary in writing could take it from him. It is true, verbal legacies, to the extent of L. 100 *Scots*, are ſuſtained probable by witneſſes; but that can only take place where there is not a written will to the contrary. Now, What is there here to ſupply the defunct's revocation in writ, or eſtabliſh a verbal legacy by two witneſſes, but *Margaret Burns*'s oath taken in a proceſs to which *John Lauder* was no party, and on that account liable to objection, if he were to inſiſt on it, as he does not? But what the defender inſiſts upon is, that the depoſitation of this L. 40 by the defunct in her hand, cannot be proved to any effect whatever: two witneſſes would not be ſufficient for that purpoſe; and much leſs ſhe a ſingle perſon, ſuſpected and exceptionable, not only as ſhe is a woman-witneſs, but likewiſe intereſted in the cauſe, one of the four legatees being her Son. In the next place, ſhe had free acceſs to the defunct's repoſitories, and therefore muſt be preſumed to have taken the money and writs thereout, as ſhe did not ſeal up the keys, *&c.* after the defunct's death, as enjoined by the 23d act of Sederunt 1692. Upon this account likewiſe her oath cannot be regarded, though it were otherwiſe unexceptionable.

The purſuers *anſwered*, That a teſtator may take payment of a bond or bill without thereby extinguiſhing the legacy; ſo that the rule objected admits of many exceptions: Beſides the caſe in queſtion is not within that rule, as there is no evidence that he exacted, but only received payment when offered to him, never having done any ſort of diligence, or ſent meſſages ſeeking his money. But no doubt can remain, when it is conſidered, that it appears from *Margaret Burns*'s oath he had retained the ſum by him, and delivered it to her, in whom he had confidence; and to ſay, that neither her oath, nor even that of two witneſſes, could prove the depoſitation, is really diſclaiming the very law on which the objection is founded, which admits of a proof by witneſſes of circumſtances, and *indicia non mutatæ voluntatis*. As for *Margaret Burns*, her teſtimony is very credible, ſhe was a neceſſary witneſs, the defunct's landlady and a favourite in whom he had great confidence; if ſhe had been capable of ſwearing falſly in order to get the fourth part of the L. 40 to her ſon, ſhe would rather have kept the whole to herſelf. As to the Act of Sederunt, it is a very inaccurate compoſition, and ſhould either be explained, or deſerves to be neglected; it appears to be extended ſingly for the better execution of the Act 1672, for making up the inventaries of the writings or effects of deceaſed perſons whoſe heirs happen to be infants or minors: And as to the ſanction thereof, " That, if the maſter and " miſtreſs of a houſe neglect to ſeal up the keys of the dying perſon, " they ſhall be holden and reputed embezzlers of writs, money, *&c.*" The purſuers acknowledge they are at a loſs what meaning to put upon it, and would be obliged to the defender to inform them what writs, or how much money is to be holden as abſtracted.

The Lords found the legacy revoked.

N° CCVI. *November* 3. 1742.

Mrs *Jean Whitefoord*, &c. *contra Charles Ayton* and his Spouse.

1. *Miſſive, Whether importing a revokable or irrevokable donation?* 2. *If a proof by witneſſes that the ſubject of the donation was given to another is competent?*

ANNO 1734, Doctor, *Hamilton*, intending to make Mrs *Whitefoord* a preſent of his watch, chain, and ſeal, execute this intention, by writing a letter to her in the following words: *I give you my watch, chain, and ſeal, which you ſhall enjoy after my death.*

The Doctor lived about two years after the date of the letter, and having fallen ſick and died in the houſe of *Charles Ayton*, Mrs *Whitefoord* brought an action againſt *Ayton*, for delivering up the watch, &c. to her; and having referred the having thereof to his oath, he deponed, "That, "when he attended the Doctor, *anno* 1736, at the goat-whey, he deli- "vered the watch to the deponent, deſiring him to keep the ſame for "the uſe of the deponent's ſon."

To this the purſuer objected, That nothing had been referred to the defender's oath but ſimply the having the watch; *ergo* the quality which he had added, *ſcil.* "that it was given to him for the uſe of his "ſon, was extrinſic, and ought not to avail him." Whereupon the defender offered to prove the particulars mentioned in his oath by witneſſes.

Anſwered for the Purſuer, That ſuppoſing the fact true (which is very improbable) it is not relevant. 1*mo*, Becauſe the letter imported an abſolute and irrevocable donation *inter vivos*. The gift was ſimple, only the term of delivery was ſuſpended till the death of the giver. The adding the death of the giver to a donation, or promiſe, does not *per ſe* conſtitute a *mortis cauſa* donation, unleſs a clauſe of return, or power of revocation were expreſsly reſerved by the giver. See § 1 *Inſt. de donat.* *l.* 42. *ff. de mortis cauſa donat.* and *Voet.* § 4. *ad tit. ff. de donat.* 4th December 1672, *Galloway*.

It is, therefore, of no importance to prove the particulars in the defender's oath; for, upon the ſuppoſition, that the prior donation in favours of the purſuer was abſolute and irrevocable, as it did infer warrandice from fact and deed, ſo it was not thereafter in the granter's power to do any gratuitous deed in prejudice thereof. But ſuppoſing, for once, that the letter ſhould only be interprete a legacy, or donation *mortis cauſa*, yet, even in that view, it is believed, the delivery to the Defender, as narrated in his oath, muſt be conſtructed in the ſame manner; ſince the one ſeems to be done as much *intuitu mortis* as the other: if ſo, the queſtion comes to this preciſe point, How far a ſpecial legacy, being once conſtitute by writ in favours of the purſuer, could thereafter be taken away by a nuncupative legacy of the ſame ſubject to the defender. As to which it is plain, that as our law is extremely jealous of all kinds of proof by witneſſes, ſo it is a rule, that the teſtimonies of witneſſes are not admitted to prove in caſes where writ may, and uſes to be adhibited.

adhibited. And if this holds in the general, it ought *a fortiori* to obtain, that a proof by witneſſes ought not to be ſuſtained, ſo as to take away a right or obligation which is once conſtitute by writ; ſince, in this caſe, the general rule is aided by the common principle of law, *unumquodque eodem modo*, &c. See the 18th February 1631, *Houſton*. Laſtly, It was obſerved, That the watch was worth above L. 30 Sterling in value; and ſo could not be carried by a nuncupative teſtament, as ſuch are not effectual beyond L. 100 Scots.

Replied, All the quotations from the civil law, adduced for the Purſuer, relate to the caſe of donations completed by delivery; which does not apply to the caſe in hand, where the property and poſſeſſion ſtill remained with the Doctor; conſequently, there was nothing to hinder him to diſpoſe of it otherwiſe, during his life, as he really did. Upon this principle he could not be liable in warrandice on the miſſive, or ſuppoſing he was, yet thoſe that got the bulk of his effects would be liable in the ſame; but it is very plain from the common principles of law, that the firſt delivery muſt be effectual to convey the property: And the quotation from *Voet*. ſhows this to be the caſe, with an exception as to deeds granted by the Prince. In the next place, ſuppoſing the miſſive imported no more than a legacy, or *donatio mortis cauſa*, which is plainly the caſe, then it was abſolutely in the Doctor's power to adhere to it or not, to give away the ſubject, or to leave it among his effects, to be furthcoming to the legatee or not. Could not the Doctor have gifted his watch to a ſtranger? and could he not have gifted it, even *mortis cauſa*, to any perſon, by giving it out of hand? Indeed, if he had made only a verbal legacy in relation thereto, ſubſequent to the legacy by writ, there might be a doubt in the caſe; becauſe verbal legacies cannot be proved by witneſſes beyond L. 100 Scots: but, in every caſe, the delivery of the *ipſa corpora* of moveables, may be proven by witneſſes, and the intent for which the delivery is made, or title whereon, may be proved by witneſſes, though the thing be of never ſo great value; as in all bargains about moveables, becauſe the law ſuppoſes there is no danger of miſtake in ſuch a caſe.

The Lords found, the defunct's letter does conſtitute a donatio mortis cauſa, *in favours of the purſuer, and that a proof by witneſſes is not competent, in this caſe, to take away the effect of a donation conſtitute by writ, and create a new legacy of the ſame.*

N° CCVII. *November* 12. 1742.

Competition *Elizabeth Cairns* with Creditors of *Garrioch*.

1. *A ſervice as heir-general will not carry ſubjects falling to heirs of proviſion, tho' both characters co-incide in the ſame perſon.* 2. *A blank ſubſtitution in a bond, filled up by another than the writer, its effect.*

JAMES CAIRNS of *Minibuie* had two ſons, *Alexander and William.*—*Anno* 1694, The ſaid *James Cairns* lent to *Cairns* of *Garrioch* L. 600 Scots, and took the bond payable *to himſelf, he being on life; and,*

and, failing of him by deceaſe, to William Cairns *his ſecond ſon, heirs or aſſignies, ſecluding executors.* *William* died before his father, and, upon his death, *Elizabeth Cairns*, the only child of *Alexander* now deceaſed, was confirmed executrix, and ſerved heir in general to her grandfather. In the ranking of the creditors of *Garrioch*, the creditors objected, That the adjudication which had been deduced on the above bond was null, in regard *Elizabeth* had made up no proper title thereto, her general ſervice not being ſufficient to carry it.

Anſwered for *Elizabeth*, When ſhe ſerved heir ſhe brought a proof before the Inqueſt, that *William* died before his father *James*, as the retour expreſsly bears; which it is believed is ſufficient, according to practice, in the affair of ſervices, to carry the bond. If, indeed, *William* had ſurvived his father, or left other heirs than *Elizabeth*, a ſervice as heir of proviſion would have been neceſſary, in order to complete the title; but as ſhe was both heir-general and heir of proviſion, by the ſubſtitute's having left no ſeparate heirs of his own, a general ſervice is ſufficient: For when a perſon is ſerved heir in general, he has right to every ſubject which pertained to his predeceſſor, not ſpecially conveyed away to another; and no body can impugn that right, unleſs they can condeſcend upon another who has a better. In the next place, There is an implied termination of all ſubſtitutions being in the heir-general of the fiar; therefore a ſervice, as heir-general, is a ſufficient title to carry every ſubject which belonged to the predeceſſor, when there is not another perſon claiming, in virtue of a ſpecial right. *Elizabeth* does not deny, that a ſervice as heir of proviſion would have carried this bond; but what ſhe contends is, that, as ſhe had both rights in her perſon, a ſervice as heir general was ſufficient. But, to remove all objection, ſhe is now ſerved heir of proviſion.

Replied for the Creditors, That of old, when a man took a bond conceived in the manner above ſet furth, it was conſtructed that a ſubſtitution was not intended, but a conditional inſtitution; ſo as that the perſon named in the ſecond place, could only have right, in caſe the creditor died before the term of payment, and therefore that his claim vaniſhed altogether, in caſe the creditor ſurvived the term: but this was afterwards altered in practice; becauſe it was judged reaſonable, that the perſon whom the creditor did prefer to ſucceed to him, in caſe he died before the term of payment, would be the ſame whom he would prefer in caſe he ſurvived the term. And, according to this rule, there is no doubt, that if *William Cairns*, the *nominatim* ſubſtitute, had ſurvived his father, he would have taken the bond, and not the father's repreſentatives, tho' the father ſurvived the term of payment.

2*do*, Where a man takes a bond to himſelf, and failing him by deceaſe, to *Mævius*, and his heirs, executors or aſſignies; tho' *Mævius* die before the creditor, his repreſentatives will be underſtood to be heirs of proviſion to the creditor, and they will take the bond in preference to the creditor's heirs of line or neareſt of kin. This is no more than an extenſion of the former rule, and depends upon the ſame reaſon. What the creditor is ſuppoſed to have in view is, that, after his own death, *Mævius* ſhould ſucceed to the bond, and his heirs after him, to the total excluſion of his, the creditor's, other heirs; and it cannot be ſuppoſed he meant a different thing, upon the unforeſeen accident of *Mævius*'s dying before him; therefore, the creditors muſt take it for granted, that tho' *William* died before his father,

father, yet his repreſentatives (ſuppoſing him to have had heirs of his body) would be entitled to take up the bond as heirs of proviſion to the creditor, and that the ſame would, in that caſe, not deſcend to *Elizabeth* the heir of line. Theſe things premiſed, it was further *anſwered*, That *Elizabeth*'s ſervice as heir of line to her grandfather could not eſtabliſh a right to the bond, becauſe, by that ſervice, there is no evidence brought, that *William* died without heirs of his body; conſequently, it did not appear at all that ſhe was entitled to ſucceed to the bond. 2*do*, *Eſto* it did appear that ſhe is the perſon entitled to take up their ſucceſſion; yet as ſhe has made her election to repreſent her grandfather as heir of line only, the ſervice will give her no right to any ſubject ſhe was entitled to take up as heir of proviſion. A ſervice is a decreet, and partakes this in common with all other decreets, that the facts therein ſet furth muſt be both relevant and proved, otherways it is null: the application of which to the preſent caſe is obvious, as there was no proof brought to the Inqueſt, that *William* died without heirs of his body. With us there is no ſuch thing as *ſui et neceſſarii heredis*, every heir may take up the ſucceſſion or not as he pleaſes; and where two titles of repreſentation coincide in the ſame perſon, it is in his power to repreſent upon one or other as he thinks fit; and if he chuſes the one, it will not make him repreſent upon the other. *Elizabth*, in this caſe, choſe to repreſent as heir-general, which can never have the effect of a ſervice as heir of proviſion; and as this holds with reſpect to the active repreſentation of heirs, ſo it muſt likewiſe hold in the paſſive, otherways many fatal conſequences would follow.

See the caſes *Murray* of *Conheath*, and *Neilſon* of *Chappel*, 22d January 1706, *Gilbert Livingſton*. 6th July 1736, *Edgar*.

The Lords found, that by the conception of the within bond of L. 600 *Scots, the ſame belongs to the heirs of proviſion of the inſtitute* James Cairns, *and can only be carried by a ſervice as heir of proviſion to him; and therefore, the purſuer not having made up her title in that way, but as neareſt heir of line to her grandfather* James Cairns, *found the adjudication deduced on that title null, ſo as to found the purſuer in a competition with the other creditors-adjudgers of* Garrioch.

But on a reclaiming petition and anſwers, *The Lords found, the bond in queſtion was originally blank in the ſubſtitution; and that it does not appear to have been filled up by the debitor, the writer of the bond, and ſo muſt be held ſtill as blank in the name of the ſubſtitute: and therefore found, that the right to the ſaid bond was eſtabliſhed in* Elizabeth's *perſon, by her ſervice as heir in general to* James Cairns *the original creditor, and repelled the objection to the adjudication at her inſtance.*

N. B. It appears from the above petition and anſwers, that ſome miſtakes had happened in clerking the firſt interlocutor.

N° CCVIII. *November* 13. 1742.

Lady *Forreſter contra* Lord *Elphingſton.*

1. *Vicennial preſcription of bills.* 2. *Qualities adjected to a defender's oath, whether intrinſic or extrinſic.*

LADY *Forreſter*, as having right to a bill due by Lord *Elphingſton* to the deceaſed Lord *Forreſter*, dated *anno* 1716, brought a proceſs for payment. The defence was, the vicennial preſcription. Whereupon the Lords ordained both parties to give in memorials, touching the ſtate of the law of foreign mercantile nations, anent the endurance of bills at the time of the act 1681.

The ſubſtance of the argument for the purſuer was, That, by the law of *Scotland*, great care is taken, in every caſe, to regulate the courſe of preſcription; and, as there was no ſtatute with reſpect to the endurance of bills, it ought to be the ſame as in other contracts and bonds, *i. e.* for 40 years: that it was obſerved by Sir *George Mackenzie*, in his obſervations on the act 1669, the Parliament expreſsly refuſed to limit the endurance thereof, but left the ſame to the common law.

That what had given occaſion to doubt, was the temporary preſcription with reſpect to the negotiation of bills, in order for recourſe, and the ſummary diligence allowed by act of Parliament, when duly proteſted within ſix months.

But theſe have nothing to do with a bill, when it is completed by acceptance; ſeeing, by the acceptance, there is an obligation completed *in ſuo genere* betwixt the holder and the accepter, the endurance whereof ought to afford action and purſuit for recovery of the money, as long as other contracts. See 21ſt article of the edict *Lewis* XIV. 1681, and the Sieur *Savary lib.* 3. *cap.* 6. *p.* 162, *June* 1728, *Hedderwick*.

For the defender it was obſerved, That it was ſolely owing to the privilege of commerce, that bills of exchange are ſuſtained as probative, and becauſe of the ſpeedy diſpatch the buſineſs of merchants requires, whereby bills uſe not to be keept up for any time, and if they were ſo kept up, they would not be probative, (as Lord *Stair* obſerves); and becauſe it is the general cuſtom of merchants, which particular ſtatutes cannot remeid. That holograph writs are the leaſt capable of forgery of any, and yet theſe preſcribe in 20 years; conſequently, there was much greater reaſon for limiting the endurance of bills, as theſe are ſeldom holograph of the debtor or accepter. That people's manner of ſubſcription varied often in the ſpace of 20 years, and thereby may be apt to forget whether they ſubſcribed ſuch deeds or not; which might be dangerous to both debtor and creditor, if they were even allowed to lie as long over as holograph writs, when no diligence had been done upon them as the law directs.

As to the Parliament's refuſing to limit the endurance of bills, it was obſerved, That, at that time, we had no act authorizing ſummar diligence; ſo that it might be thought unreaſonable to fix a preſcription which might affect ſtrangers: but now, when ſummar diligence is allowed, if that is neglected, and ſuch writs lie over for twenty or twenty-five years without any demand upon them, they ſurely ought to have leſs faith

faith than holograph deeds: eſpecially, if it is conſidered, that theſe laſt are not looked upon as permanent ſecurities, and therefore limited to twenty years; conſequently, bills are far leſs to be conſidered as ſuch. See *Scarlet* upon the law and cuſtom of exchange, *p.* 337. *Forbes p.* 176. *Savary's* univerſal Dict. of Commerce, *p.* 338. Statute of Limitations, 21ſt *James* I. *cap.* 16.

The purſuer, ſuſpecting the validity of the defence, referred reſting-owing to Lord *Elpingſton*'s oath.

Who deponed, "That the bill was truly accepted by him: that he "has paid no part of it, either to Lord *Forreſter*, or any having his or-"order; and that, in a converſation with my Lord *Forreſter* when "in *Scotland*, in the 1727, my Lord *Forreſter* acknowledged he lay "under many obligations to the defender; particularly, for money lent "by the defender to him, while in *Flanders*, from the year 1707 to "1711, and particularly for entertaining his ſiſter in his family for ma-"ny years: that he was conſcious he was conſiderably in the defender's "debt, and would give the deponent up the bill for L. 50, if Mr *Cuningham* "had been in *Edinburgh*: that he would do it as ſoon as he returned to "*Scotland*, and would make a further acknowledgment to the defender "for his favours to him and his ſiſter: and laſtly, That the defender "had ground to think, that the Lord *Forreſter* was more in his debt "than the L. 50, without regard to the Lady *Herbertſhire*'s aliment for "four or five years."

The Lords found, the oath did not prove reſting-owing.

N° CCIX. *November* 19. 1742.

Competition *Robert Rae*, &c. with *John Neilſon*, &c.

1. *It is competent to affect the intereſt of a partner in a copartnery by arreſtment.* 2. *Arreſtment in the hands of the remaining partners will affect the ſame, tho' the ſubjects of their copartnery were, at the date of the arreſtments, abroad, provided theſe were made good to the company.*

ROBERT and *James Robertſons* entered into a company-trade with *George Bogle*, &c. merchants in *Glaſgow*, for a particular negotiation, the import of which was, that they ſhould ſend out certain cargoes of goods for building a ſhip in *Boſton* in *New-England*, and the remainder upon merchandize to be loaded aboard that ſhip, and others which ſhould be hired; with the proceeds whereof new adventures outward were to be carried on in a running trade, for the profit of the joint adventurers: all which was to be managed under the direction of certain ſupercargoes to be ſent abroad to reſide, and of others who were to accompany the goods. This joint trade continued for ſome years, when *James Robertſon* having died, and *Robert Robertſon* become bankrupt, ſome of their creditors arreſted in the hands of *George Bogle*, &c. the other joint adventurers with the *Robertſons*, and likewiſe uſed arreſtment at the market-croſs of *Edinburgh*, pier and ſhore of *Leith*, in the hands of certain factors for the two *Robertſons* reſiding abroad, in whoſe cuſtody they ſuppoſed their debtors effects might be lodged.

In

In the courſe of the furthcoming which was brought at the inſtance of the creditors who had uſed arreſtments, Meſſieurs *Bogle*, &c. (who raiſed a multiple-poinding) emitted a declaration, giving a detail of the joint adventures in trade that they had with the two *Robertſons*; and declared, that, at the time of the arreſtments, they were not debtors to the *Robertſons*: on the contrary, *they* were debtors to the laſt adventure in L. 300 Sterling. That the declarants had diſpoſed of the ſhip and cargoe at the particular rates ſpecified in their declaration; and that there were certain ſums for which their factors abroad were accountable to the partners.

And this declaration was held as evidence, by all parties, of the intereſt which the *Robertſons* had in their adventure with Meſſ. *Bogle*, &c.

The creditors of the *Robertſons*, who had neglected to uſe arreſtment, objected to the forthcoming, *1mo*, That the partners, in the preſent caſe, were not only not erected into a body-politic, or corporate, but that there was not even a contract of copartnery among them: ſo that it was new to conſider this copartnerſhip as an *univerſitas*, as a right veſted in the partners as a body corporate, and affectable by one diligence. *2do*, It was objected, That, at the date of the arreſtment, no part of *Robert*'s ſhare was in the hands of the partners, and that the ſtile of an arreſtment directs the arreſtee to detain in his hands ſuch liquid ſums of money as he owes to the arreſter's debtor, and ſuch goods belonging to the debtor as he has in his poſſeſſion. Now, none of the partners were debtors to *Robert* in one ſhilling, at the date of the arreſtment; conſequently, there was nothing in their hands that could be attached or ſecured thereby. Nor could it alter the caſe, that they had ſeveral parcels of goods in foreign parts common with *Robert*, and ſeveral other goods on ſhip-board, alſo intended for foreign parts, in common with him; for this did not put *Robert*'s goods in their poſſeſſion or cuſtody, nor indeed under their power. Neither can it make any alteration, that ſome of the goods *de facto* came home, which the partners ſold for the common account; and that, if the goods that are ſtill in foreign parts come ſafely home, and come into the partners hands, there will be a certain ſhare thereof the property of *Robert*. For an arreſtment does not reach *acquirenda*, it affects only the debts or goods of the debtor, due by, or in the hands of the arreſtee, at the date of the arreſtment. Laſtly, Suppoſing there had been a proper copartnery in this caſe, which was diſſolved by the death of *James*, and the bankruptcy of *Robert quoad* their intereſt, and that the copartnery ſubſiſted in the remaining partners, ſubject to the balance of the ſtock belonging to *James* and *Robert*, after payment of the debts due by them ſeverally to the copartnery, yet ſuch intereſt is not affectable by arreſtment; it is neither a liquid debt, nor moveable goods belonging to the debtor, but is a ſort of *univerſitas*, conſiſting poſſibly of heritable debts due to the partners. And the claim of the *Robertſons* is a balance ariſing upon the whole, after payment of the company-debts; and therefore is the proper ſubject of an adjudication, but not of an arreſtment, which affects only liquid debts, or *corpora mobilia*.

Anſwered for the creditors, purſuers of the furthcoming, That, if the effects of a copartner could not be attached by an arreſtment in the hands of the managers of a copartnery (who had the power to ſell and diſpoſe of the goods, *&c.*) our law would be extremely deficient; but as any

any one partner may ſue the reſt to account, ſo every creditor of his may do the ſame for recovering the ſums due to him.

Neither was there any neceſſity for a charter to create a body-politic, or a contract in writing; conſent is ſufficient for this purpoſe, and the actings of the ſeveral partners is ſufficient evidence of that conſent. What was advanced by each partner became common ſtock; debts contracted for carrying on the company-concerns bound the whole; books were kept: and if theſe circumſtances do not infer a copartnery, ſo as the managing partners ſhould be accountable to the other partners, (or their creditors doing diligence) for the profits, the purſuers do not know what will.

As to the 2d objection, it was *anſwered*, That the ſurviving partners, having the power and command over the ſubject of the copartnery, wherever the ſame might be lodged for the time, the caſe was the ſame as if the whole had been in their cuſtody, and ſo ſubjected to the arreſtment. In the ſame manner, the cuſtody of the ſupercargoes abroad, or in their ſhips at ſea, who were accountable to the ſurviving partners, or their conſtituents, muſt be deemed in law the cuſtody of the conſtituents themſelves; as much as goods conſigned to a merchant in *Edinburgh*, tho' the goods lie at *Leith*, in cellars and ware-houſes, of which his ſervants have the keys, will be conſtructed in the cuſtody of the merchant himſelf; and an arreſtment in the merchant's hands for the debt of the conſigner will reach ſuch goods. See a late caſe betwixt Sir *Hary Innes* and the creditors of *Gordon*.

And, with reſpect to the laſt objection, it was anſwered, That the ſurviving partners have declared, that the ſubject of the copartnery conſiſted in moveables; and altho', in ſome reſpect, the copartnery may go under the name of an *univerſitas*, while it ſubſiſts, yet when it is at an end, and that there is a neceſſity for the diviſion of the ſubject of the copartnery, as in the preſent caſe, ſo as that the company debts muſt be paid off, and each partner have his ſhare in the free profit, it remains no more an *univerſitas*; but the caſe falls to be conſidered, as if there was an actual diviſion, and each partner's ſhare was aſcertained, which is the purpoſe of the preſent action. See 18th *March* 1707, *Aliſon*. The only habile diligence therefore in this caſe is arreſtment, and not an adjudication.

The Lords found, it was competent for the creditors of Robert *and* James Robertſons, *the two bankrupt partners, to affect the debtors intereſt in the copartnery by arreſtment, and that the arreſtments uſed in the hands of* George Bogle, *&c. the remaining partners, did habily affect the ſame, notwithſtanding the ſubjects of their copartnery were, at the date of the arreſtments, in the hands of the company's ſupercargoes at ſea, or of their factors abroad; and found the ſame liable to be made furthcoming by the ſaid partners to the creditors-arreſters, ſo far as the ſame have been made good to the company by the ſaid ſupercargoes or factors.*

N° CCX. *December* 2. 1742.

Simon Lord *Lovat* contra *James* Lord *Forbes.*

A promiſſory note granted in London, *by a Scotſman reſiding there, to another, and payable on demand, falls under the Statute of limitation, cap.* 16. *parl.* 21. James I. *if no action is brought thereon within ſix years.*

LOVAT, happening occaſionally to be at *London* in *Auguſt* 1720, lent *William* Lord *Forbes* L. 100 Sterling, for which he took his promiſſory note, *obliging himſelf to pay the ſaid ſum on demand*; and, upon *William*'s death, he brought an action againſt *James*, as repreſenting his brother *William*, for payment.

The defence was, That for ſome years before the date of the note, *William* Lord *Forbes* reſided conſtantly in *London*; and, before that period, had never fixed his domicile, or place of reſidence, in *Scotland*: that ſoon after the 1720, he married an *Engliſh* lady by whom he got a conſiderable fortune, and was thereby in a condition to have repaid this money, which it is preſumed he did, as the defender never heard of this claim until the date of this ſummons. Further, from the time of the debtor's marriage he had a fixed reſidence in *London* with his family, until the 1728, ſave once that he was occaſionally in *Scotland* for a few weeks; and that *London* being the *locus contractus*, the ſecurity payable on demand, which behoved to be the debtor's dwelling-houſe, or place of reſidence, and no demand having been made within the years of preſcription, the ſame was cut off by the ſtatute of limitation.

Anſwered, The defence reſolved in the negative preſcription, ariſing from the laws of a foreign country, to which the purſuer could not be ſubject, but during the period of his reſidence there; which never happened for any ſpace, near equal to the number of years required by the ſtatute to eſtabliſh a preſcription; therefore there were no *termini habiles* for preſcription in this caſe, which could never commence againſt the purſuer ſo long as he remained under the authority of the law of *Scotland*, neither could he be reckoned negligent, which is the foundation of the negative preſcription within ſix years, as ordained by the ſtatute of limitation, when he did not reſide there. Further, This doctrine is agreeable to the principles of moſt lawyers, That all perſonal claims are ſubject to that juriſdiction where the creditor has had his reſidence; and it muſt add ſome weight to it, that the debtor in the note had likeways his dignity, eſtate, and principal dwelling-houſe in *Scotland*, albeit he may have had ſome temporary reſidence in *England*; but it can never infer an alteration of one's domicile, that he may have occaſionally, for a certain purpoſe, reſided elſewhere. Nor can the *locus contractus* ſupport the *Engliſh* preſcription in this caſe, unleſs the defender will maintain that the debtor could not have been purſued in *Scotland*, which it is impoſſible to do, as the noble Lord the debtor was a *Scotch* peer, and had his domicile, or *ſumma rerum et fortunarum*, there. It was ſurely competent for the purſuer to have brought this action againſt his debtor in *England*, *ratione contractus*, if he found him there, or to have inſiſted againſt him here *ratione domicilii*, or *rei ſitae*, at any time within the ſpace of 20 years, according to our law. The form of promiſſory notes is promiſcuouſly

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the ſame in both countries, and the demand being now made within the period limited by our ſtatute, ought to make our laws govern the deciſion of the preſent queſtion preferable to thoſe of another country. See *Andreas Gaill, lib. 2. obſervat.* 124. § 16. *l. 7. C. de incol. l.* 17. § 13. *ff. ad municip.* 17th *February* 1672, Commiſſaries of *Edinburgh.* 16th *July* 1708, *Thomſon.* 25th *July* 1732, *Rodgers.*

Replied for the defender, That tho' one might have a *forum competens* in many different countries, *ratione originis, domicilii, rei ſitæ, et contractus;* it did not from thence follow, that there might be as many different preſcriptions, as there are different *forums*, where a party may be ſued in judgment. In the next place, The law of the country where the debt is contracted, and which is preſumed to be the *locus ſolutionis*, if another place is not ſpecified for that purpoſe, muſt regulate the effect of any obligation, and conſequently the endurance of it. This doctrine ſeems to be founded in the principles of the law of nations, and is, in effect, a conſequence of admitting an obligation or contract executed abroad to have its full effect here, *e. g.* one reſiding in *London* could not be found fault with, for having paid that debt without a written diſcharge, if the law of *England* allowed a proof by witneſſes of ſuch payment to be effectual in diſcharge of the debt, and therefore it would be moſt unjuſt, if the creditor finding his debtor perſonally in another country, ſhould object to the proof by witneſſes of ſuch payment. The ſame abſurdity would occur with reſpect to preſcription, which is no other than a legal diſcharge of the debt. A debtor in *England*, againſt whom no action has been brought within ſix years, thereby obtains a general *quietus*, an abſolute diſcharge of the debt in all time coming, and therefore need not be ſolicitous about preſerving any diſcharge in writ, or proof by witneſſes, when the law of the country where the obligation was granted, and where he reſided for the time, has given a general abſolvitor; to ſuppoſe, therefore, that this perſon could be attacked for payment of this debt, in all the other countries of *Europe*, where he might happen to have a *forum competens* at the time, and that it ſhould not be competent for him to defend himſelf, in the ſame way and manner he could have done in *England*, would be abſurd. In a word, it is not to be doubted, that if the obligation is releaſed *quocunque modo*, according to the law of the country where the debt was contracted, and where payment fell regularly to be made, but that diſcharge muſt meet the obligation in any part of the world, where it is made the ground of action. As to the purſuer's argument, that preſcription muſt be regulated *ſecundum leges fori actoris;* it is plainly inconſiſtent with the firſt principle of law, *actor ſequitur forum rei*, as well as the opinion of the doctors; beſides the form of the note ſhows, it was not intended for a permanent ſecurity, as it was made payable on demand; and as that behoved to be perſonally to the Lord *Forbes*, or at his dwelling-houſe for the time, it muſt have been in the eye of parties, that the money was to be repaid at *London*, which therefore was both the *locus contractus*, and the *locus ſolutionis*. See *Huber* in his *prælect. de conflict. leg. diverſ. Voet, lib.* 1. *tit.* 8. § *ult.* 16th *November* 1726, *Galbraith;* 21ſt *February* 1733, *Balbirnie;* 7th *February* 1734, *Hyde;* 10th *January* 1702, *Chatto.*

The

The Lords found, That the ſtatute of limitation governed this caſe; but remitted to the Lord Ordinary to hear parties, whether the purſuer's reſidence in Scotland *ſtated him in the caſe of the exception from the act (beyond ſeas)?*

Nº CCXI. *December* 2. 1742.

Competition *William Bartlet*, with Provoſt *Stewart*.

A tackſman is not liable for the ſub-tack duty, who has renounced the benefit of warning, tho' he uplift the ſame after the iſh, if no notice is given him to remove.

ANNO 1721, the *York-building* company granted a leaſe of ſeveral lands to the ſaid Provoſt *Stewart, &c.* their aſſignees and ſub-tenants for the ſpace of 19 years, from *Whitſunday* 1721; and by the leaſe, the tackſmen bound themſelves to remove at the expiry thereof, without any warning, or proceſs of removing. This tack determined at *Whitſunday* 1740, before which the Provoſt made the company ſeveral offers for a renewal of his leaſe, which they refuſed, and, in *April* 1741, they granted a new tack of the ſaid ſubjects to *James Holworthy*, who aſſigned the ſame to *William Bartlet*, upon which he claimed a right to the rents of the lands 1740 and 1741; and in the competition that enſued therefor, it was pled for *William Bartlet*, that Provoſt *Stewart* ought, in terms of his tack, to have removed at the expiry of his leaſe (*Whitſunday* 1740), tho' he was not formally warned to remove; and even abſtracting therefrom, there was no *termini habiles* upon the ſtatute 1555, for a legal warning, in order to debar him from uplifting the rents of lands of which he had no natural poſſeſſion, the whole of that act being apparently calculated allenarly for tenants, who are in the natural poſſeſſion; conſequently, if there was no neceſſity for a warning, there could be no tacit relocation, which is the conſequence of the omiſſion to warn; and this will be of more force, if the nature of the tack to the Provoſt is conſidered, which indeed approaches nearer to an aſſignation to the rents of lands than a proper tack, ſeeing it could never be in the view of parties, that the tackſmen were to apprehend the natural poſſeſſion of the lands; beſides, as the company rejected the Provoſt's offers, it was a ſufficient notification to him, that they did not intend he ſhould have any further concern in the leaſe, upon the conditions he had it before, whereby there can be no place for pleading a tacit relocation, ſuppoſing the contract were of that nature as to admit of it; beſides, *William Bartlet* ſufficiently interpelled the Provoſt from intromitting with any of the rents, as he took inſtruments againſt him in *June* 1741, not only to accompt for his paſt intromiſſions, but likewiſe that he ſhould deſiſt from uplifting any more of the rents in time coming, which is ſufficient interpellation as to the crop 1741. See *Stair, tit.* Tacks, § 23. 6th *March* 1632, Lady *Lauriſton*; and a late caſe betwixt Lord *Darnly* and *Campbell* of *Shawfield*.

Anſwered for Provoſt *Stewart*, That no notice or intimation was ever given to him by the company, or any other in their right, that he ſhould remove

remove at *Whitſunday* 1740, when the tack expired; neither did he ever ſhow any inclination to renounce: which mutual forbearance he underſtood, amounted to a tacit relocation, upon the footing of the former tack, in conſequence whereof he uplifted the rents from his ſub-tenants; that his title to the two years rent in queſtion, in virtue of tacit relocation, is clearly founded on the principles of law; as it could not be diſputed, that his leaſe was a tack in the moſt proper ſenſe and form, ſuch as intitled him to the natural occupancy of the lands, tho', for his conveniency, he ſubſet the ſame, ſo that the nature of the ſubject was clearly capable of tacit relocation: and if it had not been for the clauſe in the tack, diſpenſing with a warning, there can be no doubt but it would have been neceſſary; ſeeing, with reſpect to the Company, the Provoſt was the proper and immediate tenant of the whole lands let by the leaſe. Nor is it material to enquire, whether a warning would have been neceſſary, if that ſolemnity had not been diſpenſed with in the tack, becauſe ſuch diſpenſation does not bar tacit relocation, which takes place by the ſilence and acquieſcence of both parties? Neither can the intimation in *June* 1741, have any effect or operation, even with reſpect to the rents of that year, ſeeing the tacit relocation commenced at *Whitſunday* 1740; after which he ought to have had due notice ſometime before *Whitſunday* 1741, to remove, otherwiſe he had a title to the rents of that year due by his ſub-tenants, upon the footing of tacit relocation. See *Stair*, *tit.* tacks, § 38 and 23. *Craig*, § 10. *hoc. tit.*

The Lords, in reſpect no intimation was made to Provoſt Stewart *to remove at* Whitſunday 1740, *nor any perſon appointed by the Company that year to uplift the rents: Found, he was* in bona fide *to intromit with that year's rent, and is only accountable for the tack-duty; but found him accountable for the rents, crop* 1741.

N° CCXII. *December* 3. 1742.

Katharine, &c. *Caves* contra *David Spence*.

Septennial preſcription of the act 1695.

ANNO 1710, *Robert Bannerman* granted bond to *James Clark* for L. 50; and, in the 1712, Mr. *Spence* granted an holograph obligation to *Clark*, in the following terms: "Whereas *James Clark* did, at "my deſire, lend to *Robert Bannerman* L. 50 Sterling, conform to his "bond given thereupon: Therefore I hereby oblige me and mine, that "the ſaid *Robert Bannerman* ſhall truly repay the ſaid ſum and annual-"rents; or elſe to content and pay the ſame myſelf, upon demand, to "the ſaid *James Clark*, he giving me an aſſignation to the ſaid bond."

The *Caves* having a right to this obligation, brought an action for payment againſt *Spence*. The defence was the ſeptennial preſcription upon the act 1695.

Anſwered, It was the Defender's faith which *Clark* followed in lending the money, conſequently, he muſt be conſidered as the party principally bound. The receipt of the money is not the determining circumſtance to denote who is principal, and who is cautioner; he, in all caſes,

is always understood the principal party, upon whose account the money is advanced, and whose faith is principally followed: letters of credit are a strong example of this, and the present case, comes to be precisely the same. The defender's obligation, acknowledging that the money was advanced at his desire, is, in effect, a letter of credit. 2*dly*, There is no clause in the statute 1695, comprehending the case in question; for the cautioners in view of the act are those who are bound *for, and with another, conjunctly and severally*, and who may be attacked without necessity of discussing the principal parties; and it contains this further limitation, that the cautioner be bound in the same bond with the principal, which, tho' it may appear whimsical, there is ground for it in the act. See 10th *February* 1710, *More;* and 9th *February* 1715, *Rutherfoord.*

Replied for the defender, To the first, that it was only said *narrative* in the obligation, that it was at the defender's desire the money was lent to *Bannerman;* for the question still recurred, what is the nature and import of the obligation itself? And that it is really a cautionry one in all the senses of the word, is obvious; how then can it be maintained to be of the nature of a letter of credit, which always is, and ought to be interposed and given before the advance of the money, whereas here it was not till two years after? See the *Dictionaire de commerce.*

To the *second* argument, it was *answered*, That it was not a conclusive way of arguing, that, because in one of the clauses of the act, the most favourable case for the creditor is set down, as an instance where the cautioner shall not be bound after seven years; that is, tho' he be bound "for, and with another, conjunctly and severally, in any bond "or contract for sums of money, that therefore other cautioners are "not. And whether the characteristics of cautioners specified in the statute, appears in the original obligation, or supervene by an accessory one, *per inde est*, it is the prejudice arising from cautionry-obligations the law intended to prevent, by reason of the facility whereby men are induced to engage therein; and therefore, whether this arises from one, or from separate writings, makes no difference, because, truly, there is none in the nature of the thing.

The Lords found the defender could not have the benefit of the act 1695.

N° CCXIII. *December* 3. 1742.

Earl of *Eglinton*, contra the Tenants of the Baronies of *Kilmaurs*, &c.

Tenants who reap no more than answers the expence of seed and labour, are not liable in rent.

THE Earl pursued these tenants for the rents of their possessions, crop 1733.

The defence was, that there happened, in the month of *June* that year, an extraordinary storm of hail and rain, accompanied with thunder and lightning, which destroyed and laid waste almost their whole corns,

corns: that the calamity was general, tho' it fell with a particular violence on the defenders, in ſo much that ſcarce any of them reaped what was ſufficient for defraying the expence of ſeed and labour; conſequently, as there was no crop, the defenders could be liable in no rent. And a proof having been allowed, and led, the moſt of the defenders proved their defence. *Anſwered*, The whole of the proof was a circle of the ſeveral defenders deponing for one another; every man depones for his neighbour, and his neighbour for him. 2*dly*, It was ſaid not to be a ſettled point amongſt the Doctors, whether even a total ſterility for one year does afford the tenant, who has a leaſe for ſeveral years, any claim of deduction on account of the ſterility of that particular year? And whether he ought not to compenſate the loſs of one year with the profit of another; ſeeing, in all ſuch matters, there is an evident chance, which each party runs the risk of? But as the purſuer is ſenſible the defenders ſuffered, he is willing to give the ſame allowance the reſt of the gentlemen of the county gave to their tenants, *ſcil.* a half year's rent.

Replied to the *firſt*, That all the witneſſes were perſons of entire credit, men of ſubſtance for perſons of their degree, and poſſeſſing by tacks: that none had ſworn to his own loſs, and ſwearing to his neighbours, could be no proof as to him; ſo the proof for each muſt be taken by itſelf. And to the 2*d* it was *anſwered*, That what the defenders had reaped, would not defray the expences of ſeed and labour, conſequently there was no crop, as nothing is underſtood in law to be *in fructu*, until deduction of the charges of gathering and in-bringing the fruits. See *l.* 46. *ff. de uſuris et fructibus. Voet*, § 25. *tit. locati. l.* 25. § 6. *eod. tit.*

The Lords found no rent due by ſuch of the defenders, who proved, that they reaped no more than about the value of ſeed and labour.

N° CCXIV. *December* 9. 1742.

Murdoch King, contra *John Hunter*.

Can horning againſt a ſuperior paſs on a decreet of adjudication obtained before a ſheriff, on a decreet cog. cauſa?

MURDOCH KING having obtained a decreet of adjudication upon a decreet *cog. cauſa*, before the ſheriff of *Stirling*, containing a precept againſt the ſuperior for infefting him, he applied, in common form, to the Ordinary on the bills, to direct letters of horning againſt the ſuperior.

The Lord Ordinary recommended to the keeper, and writers to the ſignet, to give their opinion what their practice was in ſuch caſes. The report was in the following terms: "That they never had obſerved a "horning paſs thereupon, where there was no abbreviate, tho' ſome of "the ſociety have ſeen ſuch adjudication, without abbreviates, but had "no occaſion to know, whether horning followed or not: that the "ſociety are of opinion they are ſufficiently warranted to preſent bills, "and expede letters of horning upon ſuch adjudications, tho' there be "no

" no abbreviate, provided ſuch decreets contain precepts, directing horn-
" ing againſt ſuperiors."

On report of the Lord Ordinary, the Lords refuſed the deſire of the bill.

N° CCXV. *December* 9. 1742.

Colonel *James Cathcart*, Purſuer, contra *George Middleton* of *London*, Banker, Defender.

Statute of limitation, James I. *of* England, *anno* 21. *cap.* 16.

THE purſuer brought a proceſs againſt the defender, the ſcope whereof was, That he, *anno* 1720, put into Mr *Middleton*'s hands at *London*, L. 3000 Sterling, to be employed by him in purchaſing *South-ſea* company ſtock, ſold by the company, by the third money ſubſcription; and the defender having undertaken that office, in which he failed in the due execution, therefore he was liable to repay the ſame to him with intereſt and damages.

The defender denied the fact charged in the libel, and *pled*, That the negotiation being averred to have been entered into and tranſacted in *England*, all demands ariſing, or ſuppoſed to ariſe upon it, muſt be governed by the *lex loci*, where the tranſaction was had; and, by the above ſtatute, actions of debt, actions upon the caſe, and actions of accompt, are to be commenced within ſix years after the cauſe thereof accrued, and not after; and therefore, ſince the date of the tranſaction is ſaid to have been in the famous year 1720, and no action brought, or even demand made, till after more than twice ſix years were run, the ſame is barred by the ſtatute.

Anſwered for the purſuer, That the ſuit being brought in *Scotland*, the limitation introduced by the law of *England* could not bar or ſtop the ſame, ſince no ſuch preſcription was known in our law, of which the rules could alone govern the procedure in this Court. To enforce this, the caſe was figured, of an action brought in this country, at the inſtance of one *Scotſman* againſt another (the preſent caſe), upon a contract which is determined by a ſhorter preſcription in *Scotland* than in *England*; and that the *Scots* preſcription, ſuppoſe the triennial is expired before the proceſs is commenced; it is believed the *Scots* preſcription would be ſuſtained, becauſe our ſtatutes ſo direct. Now, if this is our law, in the ſuppoſed caſe, there is ſurely no reaſon why it ought not likewiſe to be the rule where the preſcription happens to be longer: beſides, it is believed, that even, by the law of *England*, nothing which comes under the nature of a truſt, or an equitable demand againſt a truſtee, who has not performed the truſt he has undertaken, falls under this ſtatute. 2*dly*, Suppoſing the ſtatute of limation was to govern this matter; yet it contains an exception, that it does not run if the plaintiff is beyond ſea, or, which is the ſame thing, without the juriſdiction of *England*; and the purſuer having been, ever ſince the negotiation libelled in *Scotland*, except for a year or two, he falls under the exception of the act; and therefore the preſcription cannot take place againſt him. See, 16th *July*

July 1708, Executors of *John Hay*; Sir *Peyton Ventrys* reports, part ii. *p.* 345. *Siderfins* reports, *p.* 453. modern reports, *pages* 71. and 376. *Salkelds* reports, *vol.* 1. *p.* 421. and the late caſe Captain *Rutherfoord* againſt Sir *James Campbell.*

Replied, That, by the opinion of all lawyers, in the matter of the preſcription of actions, the law of the place where the cauſe of it did accrue or riſe, muſt govern the ſame; and if it were otherways, as a defender may be ſued in different countries, this abſurdity would enſue, That he might be juſtly condemned in one, and abſolved in another, whereby the time of preſcription would be abſolutely uncertain; therefore, the true rule was, to follow the law of the place to which the negotiation belonged: more eſpecially, as the defender has conſtantly reſided in *England* ever ſince. And that this caſe is comprehended under the ſtatute, cannot be diſputed, as it enacts, That all actions of treſpaſs, *&c.* excepting as is therein excepted, ſhall be commenced and ſued within the time and limitation there expreſſed; that is to ſay, actions upon accompt, and actions for debt, within ſix years next after the cauſe of ſuch action or ſuit. Here, the cauſe of action is pretended to be the giving of money on the part of the purſuer, and the undertaking, on the part of the defender, to buy South-ſea ſubſcription, and the action thereon not brought till twice ſix years poſterior thereto.

To the 2d it was *anſwered*, That the purſuer was not within the exception of the act, which goes only in favour of a plaintiff *beyond ſea*, when the cauſe of action does accrue, who has indeed liberty at his return to bring it; but if he was not *beyond ſea when the action aroſe* to him, his turning his back upon the kingdom and the cauſe did not take him from under the ſanction of the law. However, giving but not granting, that the purſuer's being beyond ſea would have ſtopt the preſcription, yet as it is acknowleged he was not, he cannot plead from equipollents, that tho' he was not beyond ſea, but in *Scotland*, the being without the juriſdiction of *England*, entitled him to the benefit of the *proviſo*. Further, it is obvious, that being beyond ſeas, and without the juriſdiction of *England*, are manifeſtly different; but, ſuppoſing for once there might be a *parratio* for ſupporting this addition to the ſtatute, yet it is poſſible, that, after the union of the crowns, when this ſtatute was made, the Legiſlator did not think it neceſſary to make abſence in another part of the iſland ſufficient cauſe to ſtop the preſcription, when abſence in common caſes of preſcription was no ſufficient plea to defend againſt it. If it had been intended to take in all who were without *England*, dominion of *Wales*, and *Berwick* upon *Tweed*, theſe words, very familiar in acts of Parliament, would have been uſed, and not have had recourſe to the words *beyond ſeas*, improper to expreſs ſuch intention. See, 4th *July* 1717, *Rae*. *November* 1731, aſſignees of *Thomas Fulks*, *Elliot* contra Duke *Hamilton.*

The Lords ordained both parties to adduce what authorities they could, upon the conſtruction of the ſtatute of limitation by the Courts in England, *with reſpect to the ſeveral clauſes whereof the meaning is controverted.*

N. B. It is informed, this cauſe was allowed to ſleep ſince that time.

N° CCXVI. *December* 9. 1742.

Creditors of *Robert Paterſon* contra *Patrick M'Aulay.*

1. *Compenſation not competent after decreet, whether the grounds thereof were acquired before or after the decreet.* 2. *Is retention competent againſt an arreſter, where the debtor is bankrupt, until caution is found, that he ſhould be law biding?*

ROBERT Paterſon having obtained a decreet againſt *M'Aulay* for L. 400 Scots, ſome of his creditors arreſted the ſame in *M'Aulay*'s hands, who, in order to diſappoint them, purchaſed ſeveral bills of *Paterſon*'s due to other creditors of his; upon which *M'Aulay* raiſed a multiple-poinding, and ſuſpended the Decreet, and having produced ſeveral bills accepted by *Paterſon*, and indorſed to him, he proponed compenſation thereon, or at leaſt that he ſhould be allowed to retain the money arreſted, in reſpect *Paterſon* was bankrupt, or caution found, that he ſhall be law-biding for the counter-claim.

For *Paterſon*'s creditors who had arreſted, it was *pled*, That the debts now in *M'Aulay*'s perſon, were all purchaſed ſince the decreet againſt him, on purpoſe to found this plea of compenſation. That none of the bills had been duly negotiate, and all of them had lien over for upwards of three years, without any diligence done thereon, whereby they had loſt all their privileges; nay none of all the indorſations bear a date, therefore it ſhould be preſumed, that *M'Aulay* had purchaſed theſe bills poſterior to the arreſtments. Were it otherways, how eaſy would it be to diſappoint creditors who have done legal diligence by arreſtment? Any one who finds he is cut out by prior diligence, has no more to do, but to indorſe his bill to the common debtor, who propones compenſation upon it, by which the arreſters are excluded. And it would be vain for the arreſters to undertake a proof that the indorſation was poſterior to the arreſtments; ſince it is done in ſo private a way? None need be preſent but the parties, neither is witneſſes or date required.

2dly, The decreet againſt *M'Aulay* was a decreet *in foro*: conſequently, he cannot now propone compenſation in a ſuſpenſion thereof. See 29th *June* 1739, *Anderſon*.

Laſtly, With reſpect to the plea of retention, unleſs caution is found, it was *anſwered*, That ſuppoſing *Paterſon* were bankrupt, there would be ſome reaſon for *M'Aulay*'s retaining until caution were found, were *Paterſon* himſelf charging for the debt; but in a competition with other creditors of *Paterſon*, he cannot have any privilege, but muſt be looked on as a common creditor of *Paterſon's*, and has it not in his power to exclude the prior diligence of the reſt, by purchaſing and acquiring debts of the charger, in order to defeat the arreſtments.

Pled for *Patrick M'Aulay*, That blank indorſations are always preſumed to be of the ſame date with the bills, as was determined 15th *July* 1709, *Roſſie*. So that the preſumption of law lies in his favours; and it is ſurely very affected in the creditors, to maintain that they can have no proof of the real dates of theſe indorſations, ſince none is more eaſy. The creditors are all alive, who granted the indorſations. Their oaths are undoubtedly relevant, as is *M'Aulay*'s oath, which the arreſters may have

have if they inſiſt upon it; ſo that there is really no danger to creditors, tho this privilege is indulged to blank indorſations. Neither has the ſuſpender any occaſion to diſpute the relevancy of the 2d point, *ſcil.* That he cannot propone compenſation in the ſecond inſtance, even where the ground of it emerged after the decreet, becauſe he offers inſtantly to pay, upon the creditors finding caution, that *Paterſon* will be law-biding for the counter-claim.

It is acknowleged, he could not be bound to pay to *Paterſon* himſelf, (as he is a bankrupt) unleſs he found caution, and a creditor of his arreſting can be upon no better footing. An arreſter is in no better ſituation than an aſſignee; nay, he ſeems not to ſtand upon ſo good a one. Surely, an arreſter is not ſuch a ſingular ſucceſſor, as to ſtand free from exceptions competent againſt his author. And this privilege competent to the ſuſpender, of retaining the ſum in his hands until *Paterſon* the creditor ſhould find caution, was competent againſt *Paterſon* himſelf, before the arreſtments were laid on; and therefore muſt be ſtill competent; he cannot be deprived thereof by laying on of the arreſtments.

The Lords found compenſation not competent after decreet, and that whether the debts on which it was pled, were in his perſon who pleads it, before the decreet, or acquired after it, and remitted to the Lord Ordinary to hear parties on the retention.

N° CCXVII. *December* 10. 1742.

Competition betwixt *Robert Paterſon* and *Simon Kelly.*

Jus ſuperveniens auctori, *&c. accreſces to ſucceſſors, according to the dates of their infeftments.*

JOHN GIRDWOOD purchaſed ſome lands from *David Aikman* in *July* 1732, the diſpoſition to which contained a procuratory and precept; and in the *September* thereafter, he, upon the narrative of being heritable proprietor, granted an heritable bond thereon to *Kelly.* In *January* 1733, *Girdwood* granted another heritable bond, upon the ſame narrative, to *Robert Paterſon*, containing procuratory and precept; upon which *Paterſon* was infeft in *November* 1734, and the ſeiſin recorded the 17th *Decembet* thereafter; *anno* 1735, *Girdwood* granted another heritable bond to *Kelly*, which contained procuratory and precept.

In *April* 1737, *Kelly* diſcovered that his debtor *Girdwood* was not infeft, whereupon he applied to him to do him juſtice, who accordingly delivered him his diſpoſition to the ſaid lands from *Aikman*; whereupon he obtained himſelf (upon his two heritable bonds above mentioned) and author infeft in *April* 1737.

Robert Paterſon having raiſed a proceſs of maills and duties on his heritable bond, *Kelly* appeared and craved to be preferred upon his two heritable bonds to the purſuer, in reſpect the common author's infeftment was attained by him, and athis expence, which therefore could only operate in his favours; at leaſt, that he ſhould have a *pari paſſu* preference with the purſuer, in regard that the infeftments of both competitors were null

until

until the common author was infeft and, from that time only could their validity be dated.

The ſubſtance of the arguments for *Kelly* were, That no man can give an infeftment who is not infeft himſelf, and that if the queſtion were only betwixt the author himſelf, the ſucceſſor's infeftment would be held good: not that it is ſo intrinſically and in fact, but becauſe no man is allowed to plead a defect in his own title. 2*dly*, Where an apparent heir grants procuratory or precept, or where a diſponee who is not infeft is the granter, their poſterior infeftment will accreſce to validate the infeftment taken by the purchaſer. And ſuppoſing no mid impediment, the caſe will come out to be the ſame as if the author had been infeft before granting the procuratory and precept. The ſucceſſor firſt infeft will have a good title to the ſubject, in competition with one deriving right from the author, after the author's own infeftment. The reaſon is, that an infeftment flowing from an author not infeft is null, and therefore the purchaſer ought regularly to take a new precept or procuratory from the author after he is infeft. But as it is a good practical rule, to avoid multiplying expence, where it can be done without prejudice to the ſecurity of the records, the 2d infeftment has been remitted in our practice; and the infeftment already taken is conſidered as granted after the author's infeftment: or, in other words, the author's infeftment is, *fictione juris*, drawn back to the date of the purchaſer's infeftment, in order to validate the ſame from its date. It is a conſequence from this rule, that any right derived from the author, after his own infeftment, will be ineffectual, in competition with the purchaſer's infeftment, tho' proceeding from the common author, before he himſelf was infeft. This purchaſer's infeftment, which is validated by the author's, tho' poſterior, becomes a mid impediment, after which the author can grant no new infeftment to his prejudice.

Let us now view the intereſt of third parties, and what effect the *jus ſuperveniens* may have in a competition with them. Suppoſe two infeftments granted by an author not infeft, while matters ſtand in this ſhape, neither of the purchaſer's infeftments are good for any thing. It is equally clear, that upon the author's being infeft, both are validated, *ipſo facto*, for the *jus ſuperveniens* muſt operate equally in favours of both: if it ſaves the one purchaſer the trouble of a new procuratory, *&c.* it muſt ſave the other the ſame trouble; conſequently, both ought to come in *pari paſſu*. The fiction of law therefore, which makes the author' infeftment of the ſame date with his competitors, is well founded in a queſtion betwixt themſelves; but in a competition with third parties, there is no ground for beſtowing ſo valuable a privilege upon the competitor firſt infeft. *Laſtly*, ſuppoſe the caſe, that an apparent heir grants an heritable bond, and the creditor is infeft; thereafter, the apparent heir is charged to enter heir in ſpecial by another creditor; whereupon adjudication is led, and infeftment follows; and laſt of all, the apparent heir makes up his title by ſervice and infeftment, no body can doubt the adjudger will be preferred, notwithſtanding of the annualrenter's prior infeftment. See 16th *January* 1663, tenants of *Kilchatten*. 21ſt *June* 1671, *Nicolſon*. 28th *February* 1708, *Aliſon*.

Anſwered for the purſuer, If the common author's infeftment accreſces at all to the prior rights granted by him, it muſt accreſce according to their dates; were it otherwiſe, they muſt all remain null, as *a non habente*, and

and the infeftments granted by the author, after he himſelf is infeft, muſt be preferable. If, indeed, any of the creditors obtains himſelf infeft by his own diligence, before the common author is infeft, his infeftment muſt ſtand good, and be preferable to the prior infeftment granted by the common author not infeft; whoſe ſubſequent infeftment cannot, in that caſe, draw back to validate the firſt infeftment; the intervening infeftment of the other is a mid impediment; for thereby the common author is effectually denuded, ſo far as concerned the infeftment procured by the other party's diligence; and this is a ſufficient anſwer to the caſe of the apparent heir laſt put. See the competition amongſt the creditors of *Kirkconnel*, anno 1737.

The Lords repelled the exception to the purſuer's infeſtment; and found the infeſtment, in favour of the common author, operates retro *to the date of the infeſtment in favours of the purſuer: and therefore found him preferable to the competitor Mr* Kelly, *according to the date of his infeſtment: but found the purſuer liable in a proportion of the expence deburſed by the competitor, in procuring the common author infeft, effeiring to the lands in queſtion, in proportion to the other lands contained in the other infeſtment.*

N° CCXIX. *December* 12. 1742.

Grizzel Williamſon, Purſuer, againſt *Walter Williamſon*, Defender.

Objection to a holograph bond conſiſting of three pages; that it was only ſigned on the laſt page.

THE purſuer brought a proceſs againſt her brother, for payment of an heritable bond granted to her by her father. *Objected*, The bond is null, being written on three pages, and only the laſt ſigned; whereas every page, by the 15th *act*, 6th *ſeſſ. K. Will.* ought to have been ſigned. *Anſwered*, This caſe does not fall under the act; 1*mo*, Becauſe it is holograph of the granter; ſo that here the reaſon of the law ceaſes, as there could be no danger in foiſting in additional clauſes; the preventing which, was the deſign of the law. 2*do*, Becauſe the act plainly regards writings, writ upon ſeveral ſheets or pieces of paper joined together. 3*tio*, There is no ſtatutory nullity introduced; it does indeed give the aid of the law to writings, writ and ſubſcribed in the manner there directed; but does by no means declare papers writ and ſubſcribed after a different manner, void and null; no, it leaves the matter where it was, *ſcil.* to be determined by the rules of law, which would have taken place, as if no ſuch act had been made.

Replied, The ſtatute is plain, and the nullity falls expreſsly under it; for, by it, any perſon may chooſe, whether he will have his ſecurity writ ſheet or book-ways; provided, if they be writ book-ways, every page be marked by their number, and ſigned, as the margins were formerly when battered? And the laſt page make mention, how many pages are therein contained? And theſe writs, marked and ſigned, as ſaid

is, are declared to be as valid and formal, as if written on ſeveral ſheets battered and ſigned on the margin. Now, in the preſent caſe, the writ founded on, is neither numbered on the pages, nor makes any mention in the laſt page, of how many it conſiſts, which is directly without the proviſion of the ſtatute. And its being holograph, will not ſupply the defect; ſeeing, according to that argument, a holograph writ without any ſubſcription is valid, which would be too great a ſtretch. And as to the reaſon given for the law, *to wit*, to prevent foiſting in of ſheets and clauſes; it was *anſwered*, That it might have conſiſted of more ſheets than one, for ought appears, which there is always ground to ſuſpect, where a writ wants the eſſentials of the law.

Duplied, The act plainly regards only writings that are compoſed of different ſheets; and the proviſions in it are noways calculated for a holograph writing, conſiſting of a ſingle ſheet; and that it might have conſiſted of more, is plainly impoſſible from ocular inſpection, and the natural and regular ſucceſſion of every clauſe.

The Lords in reſpect, that not only the writ is holograph, but that it appears all wrote unico contextu, *and that there is no ſuſpicion of any ſort againſt the deed; repelled the objection.*

N° CCXX. *December* 20. 1742.

Robert Arnot of *Balſilly*, Charger, againſt Sir *John Arnot*, Suſpender.

Is a conventional penalty wholly incurred, where there is only a partial or temporary failure?

SIR *John* ſet a tack of a miln for 19 years to the charger, for the yearly rent of 2000 merks, to commence at *Martinmas* 1742, and the tack concluded with the following uſual clauſe. And, *laſtly*, "Both "parties bind and oblige themſelves, and their foreſaids, to perform "the haill premiſſes to others, under the penalty of L. 100 Sterling, "payable by the party failzier, to the party obſerver, or willing to ob"ſerve, by and attour performance."

Sir *John* having forgot to warn the tenant who poſſeſſed the miln, to remove, he took advantage thereof, in order to keep poſſeſſion for another year: whereupon *Balſilly* charged Sir *John* with horning for the whole penalty, who ſuſpended upon this ground, That a conventional penalty could not be exacted further than to make up the real damage the party ſuſtains by failure of implement. The Lord Ordinary on the bills, paſſed the bill for L. 50 Sterling, but refuſed as to the remainder.

Sir *John* reclaimed, and *pled*, That as he was bred to the military life, and had been much out of the kingdom, he was ignorant of the neceſſity of warning the tenant who was in poſſeſſion; and tho' this was not ſufficient for a legal defence, it ought to have ſome weight in the preſent argument: more eſpecially, as there was a ſolid difference in law betwixt a penalty ſtipulated, in caſe of not-performance, and a penalty ſtipulated by and attour performance. In the *firſt* caſe, The party has his

his option; and if he chooſe not to perform, he ought to pay. In the latter, the bargain is, what is principally in view, which the parties mutually bind themſelves in all events to implement, and the penalty is only to enforce performance; it is not ſuppoſed to be the meaning of parties, that either of them ſhould put any money in his pocket, or catch at any *lucrum* by means of the ſtipulated penalty; it is indeed a good fund to make up what either has ſuffered by the other's failure, that is, for expences and damages, but it can go no further. However, ſuppoſing a conventional penalty were to be ſtrictly interpreted, the whole can only be due in caſe of a total failure: if the tackſman in poſſeſſion could not be got removed for a week, or a month, it is not poſſible to plead the whole penalty could be incurred in that event: juſt ſo, in the preſent queſtion, the delay of one year of nineteen, cannot infer, that the whole is incurred; for a partial failure ſhould only imply a claim for a proportional part of the penalty; and this doctrine ought to hold, whatever the occaſional damages may be. It is true, that where one refuſes to implement the bargain, there damages ought to enſue without limitation; but it is believed the legal conſtruction of a ſtipulation for penalty, is to liquidate the damages, that they ſhall not exceed that ſum in caſe of inability to perform. To illuſtrate this, Suppoſe the miln in queſtion had been evicted, whereby performance became impoſſible; it is believed the charger's claim for damages could not exceed the L. 100 Sterling, whatever proof he might offer of great profits on his tack. For the ſame reaſon, where there is a partial failure, without the ſuſpender's fault, whereby the charger's entry is delayed for a year, his claim of damages ought not to be ſuſtained beyond a proportion of the penalty. See a caſe obſerved by *Sinclair* 1550, *Home* contra *Hepburn*; and the 20th *June* 1710, *Hamilton*; 22d *February* 1639, *Johnſton*.

The Lords remitted to the Lord Ordinary to paſs the bill; and what was the iſſue of this queſtion, the Collector knows not.

N°. CCXXI. *January* 4. 1743.

James Norris of *New Windſor*, Purſuer, *contra James Wood*, Heir ſerved to the deceaſed Sir *James Wood*, Defender.

Promiſſory notes granted abroad, do not, per ſe, *prove their dates, ſo as to affect heritage in* Scotland.

SIR *James Wood* granted in *Ireland* ſeveral promiſſory notes to the purſuer, who, upon his deceaſe, brought an action againſt the defender as heir for payment.

The defence chiefly inſiſted on was, That as the notes wanted witneſſes, the heir, or heritage in *Scotland*, could not be ſubject thereto, as preſumably granted on deathbed, and after Sir *James*'s contracting the ſickneſs whereof he died. In courſe of the proceſs, a proof was allowed, before anſwer, to both parties, of the ſtate and condition of Sir *James* his health, memory, and judgment, the time of granting the notes in queſtion,

queſtion, and at what time he died, and of the cauſe of granting thereof; and, when reported, it appeared that the defender had failed to prove Sir *James* was on deathbed the time of granting the ſame; and that the purſuer had likewiſe failed to prove the facts he undertook to prove, *ſcil.* that Sir *James* granted the notes when he was in *liege pouſtie*, and for onerous cauſes.

The fact ſo ſtanding, the queſtion betwixt theſe parties turned upon this point, whether the promiſſory notes not being proved to have been truly granted by Sir *James* when he was in *liege pouſtie*, muſt, in law, be preſumed to have been granted on deathbead, conſequently not obligatory upon his heir?

For the defender, it was argued, That tho' there is a *comitas* obſerved with reſpect to deeds executed in foreign countries; whereby, if they appear to be formal, according to the *lex loci contractus*, they will be ſuſtained here, altho' they are not attended with all the ſolemnities required by the law of this country; yet, where there is a prohibitory law in the country where execution is ſought upon a deed, the *comitas* will not be carried ſo far as to infringe or impair the effect of ſuch a prohibitory law, or to open a door to the ſubjects of this kingdom to elude it abroad, in ſuch manner as the law would not ſuffer them to elude it at home, *e. g.* a teſtament ſigned in a foreign country, where, by the law, the heir might be burdened or prejudged, cannot affect the heir ſucceeding to lands in *Scotland*. It is likewiſe a conſequence of the law of deathbed, without which it could have no effect, that no writing (bills excepted), which is not atteſted by witneſſes, tho' otherwiſe formally ſubſcribed by the defunct, is ſufficient of itſelf to prove the ſame was ſigned by the defunct in *liege pouſtie*, altho' it ſhould bear ſuch date; but the verity of the date muſt be otherwiſe aſtructed than by the deed itſelf. No reaſon can be aſſigned why a promiſſory note ſhould be more effectual to diſappoint the heir in *England* than in *Scotland*, it is probative of its date in both countries; but it does not prove its date againſt the heir in *Scotland*; becauſe the law preſumes, that people, who impoſe upon dying perſons, to diſappoint their heirs of the ſucceſſion, will not ſcruple, in order to make the deeds ſo elicited, *ex facie*, free from challenge, to adviſe them to affix an anterior date, that they may appear to have been ſigned at a period of time when the granter was in *liege pouſtie*. This is indeed an exception from the ordinary rule, that fraud is not preſumed; but without it the law would be diſappointed every day. And it will be very difficult to aſſign a reaſon why this preſumption ought to ceaſe when a man dies in a foreign country, as frauds are not leſs common there than here; if it were otherwiſe, the law of deathbed behoved to ceaſe the moment a man paſſed the borders of *Scotland*, whereby he would be left at liberty, with the help of a contrivance which the law preſumes will be uſed in ſuch caſes, altogether to elude it. In a word, a teſtament ſigned abroad will not affect the heir, becauſe it is *fictione juris* a deathbed deed, even tho' it were proved to be ſigned in health. Is it conſiſtent with this, that a holograph writing, which is not from any fiction, but from the moſt ſolid grounds, preſumed to be ſigned on deathbed, ſhould notwithſtanding be ſuſtained, becauſe executed in a foreign country, when no evidence either is, or can be brought to elide the legal preſumption?

Anſwered

Anſwered for the purſuer, That it was a miſtake to ſuppoſe, that holograph deeds are preſumed, in all caſes, to be granted on deathbed; they are indeed liable to the ſuſpicion of being ante-dated, *e. g.* a proviſion to younger children contained in a holograph bond, is effectual even in a queſtion with the heir of blood, becauſe of the rationality. Every man is preſumed to know the laws of his own country; but that preſumption is not extended to thoſe of other countries. The law of deathbed has no place in *England* or *Ireland*, therefore there can lie no ſuſpicion againſt deeds granted there that they are ante-dated; the creditor cannot be ſuppoſed to foreſee that it may coſt him a ſuit in another country, far leſs is he ſuppoſed to be acquainted with the laws of every other country where this ſuit may be neceſſary, or that he may meet with ſuch an objection as is now pled for the defender; ſo that no preſumption can lie againſt him of ante-dating, which juſtly lies againſt deeds granted in *Scotland*, where the grantee is ſuppoſed to have the law of deathbed in his eye. Promiſſory notes ſtand upon the ſame footing with bills of exchange by the law of *England*, which it is admitted are probative of their date, and is a good ground of action againſt the heir in *Scotland*; and ſure it will not be maintained that there is a greater ſuſpicion of ante-dating promiſſory notes, than bills: nay, if the purſuer had foreſeen this objection, or intended a fraud againſt the heir, it was eaſy for him to take bills inſtead of promiſſory notes, which muſt have avoided all ſuſpicion.

And, with reſpect to the argument, That the *comitas* is never carried ſo far as to impair the effect of a prohibitory law; it was *anſwered*, The purſuer had no occaſion to differ with the defender upon this point, becauſe the obſervation does not apply to the preſent caſe; ſeeing there is no law which declares, that the ſame ſuſpicion which lies againſt a deed executed in *Scotland*, muſt lie againſt one executed in another country, where the law of deathbed obtains not. See the ſtatute 3d and 4th *Annæ*. *Cooke's inſtitutes, lib.* 3. § 337. *Voet ad pandectas de ſtatutis*, § 13. and the caſe *David Kinloch*, contra the heirs of Dr. *Fullarton*.

The Lords repelled the objections againſt the notes, and found them probative: but, upon a reclaiming petition and anſwers, the Lords found the notes in queſtion do not prove their date, in prejudice of the heir, ſo as to affect the heritage.

N° CCXXII. *January* 19. 1743.

James Watſon contra *David Maule*.

A purchaſer of lands at a voluntary roup, is not liable to a perſonal creditor arreſting the price, if he proves that the purchaſe was made on account of the ſeller.

HEPBURN of *Keith* having expoſed his eſtate to a voluntary roup, he prevailed on *David Maule* to offer on his account, for the ſame, to a certain extent, and by a letter obliged himſelf, *if the lands fell unto Mr.* Maule's *hands, to relieve him of the ſame.*

It happened that *Maule* was the higheſt offerer, ſo the lands were declared to belong to him; and, in terms of the articles, enacted himſelf to pay the price. *James Watſon* being creditor by two bills of Mr *Hepburn*'s, arreſted the price of the lands in *Maule*'s hands.

In the forthcoming *Maule* laid his defence upon the above letter; and inſiſted that he was only a name, an interpoſed perſon for Mr. *Hepburn* himſelf; and as the letter would ſtand in bar of any claim that Mr. *Hepburn* himſelf could have made on his account of this fictitious ſale, it behoved to be equally available againſt any of his creditors.

Anſwered, The defence was of the nature of an extrinſic and perſonal exception, that the defender was bound by the enactment to pay the price; and tho', in a queſtion betwixt the parties themſelves, they may be mutually repelled *perſonali exceptione, quia in pari caſu potior eſt conditio poſſidentis*; yet, where third parties are concerned, the law ought to give no countenance to any paction or agreement that is *contra bonum et æquum*, for that would be eſtabliſhing wrong by law. And, upon this principle it is, that pactions of this kind, *contra fidem tabularum nuptialium*, have never been deemed effectual. But, ſuppoſing the defence ſhould be ſuſtained, it ought not to be admitted, but upon a full indemnification, and payment of the damages and expences the purſuer has ſuſtained. No man can avoid the obligation to repair the damage which his own fraudulent practices have occaſioned to third parties; and it is not upon the arreſtment he pleads to be thus indemnified, becauſe the decreet of forthcoming can go no further than the debt upon which the arreſtment was uſed, but that the defender ought not to be allowed to plead this defence, but upon payment of the purſuer's expences.

Replied, The demand of expences was contrary to form, and the nature of the action itſelf; by which nothing can be recovered, but the debt for ſecurity whereof arreſtment was uſed; and ſurely the expence of this proceſs is no part of that debt: nay, if the defence were repelled, there could be no ground for claiming expences, unleſs the defender were found calumnious in making it. Beſides, there is no reaſon to believe the defender acted out of any wrong view in the matter: he did not ſo much as know Mr *Hepburn*'s circumſtances, or that the neceſſity of his affairs required a ſale of his eſtate; neither can the purſuer ſuffer any thing by what the defender did, for Mr *Hepburn* is more than able to pay all his debts; and, ſo far as the purſuer has expended money for recovery of a juſt debt, he has good action againſt his debtor for ſuch expences: nay, he offers to prove, that the purſuer knew before the date of the arreſtments that the defender had only offered at the roup on account of Mr *Hepburn*; ſo that the expence the purſuer has laid out ſince that time, muſt be conſidered as owing to his miſtake in law.

The Lords ſuſtained the defence, but ordained the reclaiming petition to be anſwered as to the expences.

N° CCXXIII. *January* 26. 1743.

James Hog, late Treaſurer of the Gildry of *Dunfermline*, Charger, *contra William Flockhart*, Suſpender.

Anent the privileges of a craftſman-burgeſs of Dunfermline.

THE Suſpender, who was a craftſman burgeſs of *Dunfermline*, being fined by the dean of gild for ſelling wine in that town, and prohibiting him to do ſo for the future, ſuſpended the decreet; and the queſtion betwixt the parties was, Whether the craftſmen-burgeſſes of *Dunfermline* might lawfully ſell wine, and other foreign merchandize within that burgh, without renouncing their craft?

For the charger it was *urged*, That the freemen of each royal borough were divided into two claſſes, the gildry and craftſmen, who had each privileges

privileges peculiar to themſelves. With reſpect to the firſt, their excluſive privileges were ſettled by the 12th act 1466, *James* III. whereby it was ordained, "*That nae man of craft uſe merchandize by himſelf, nor ſail "in merchandize neither be himſelf, nor his factors, nor his ſervants, but gif he "have leave, and renounce his craft but colour or diſſimulation.*" Which is likewiſe ordained to be put into execution by the act 107, 1487. See likewiſe *Hope's* MSS. collection *verb. Burrows*, town of *Aberdeen*. Lord *Fountainhall*, 8th *January*, 1697, gildry of *Stirling*.

And by the decreet-arbitral of the general convention of burrows held at *Dunfermline* 1618, proceeding on a ſubmiſſion betwixt the merchants and trades of that burgh to the convention, an abſolute diſtinction is preſerved betwixt the gildry and craftſmen; ſo that one could not enjoy the privileges of a gildbrother, and of a craftſman, at one and the ſame time.

Pled for the ſuſpender, That, by a clauſe in the ſaid decreet-arbitral, "It was declared leiſom to the craftſmen, being only burgeſſes of the ſaid "burgh to ſell and traffic with all *Scots* wares, &c. providing always, they "do not trade with foreign merchandize, nor tranſport the ſaid *Scots* wares "out of the country." In virtue of which clauſe the trades have always dealt in retail of wares of all ſorts, foreign and domeſtic, abſtaining from the exportation of home goods, and importation of foreign merchandize. And with reſpect to the act of *James* III. on which the claim of the gildry is founded, it was *anſwered*, That length of time could never alter the ſenſe of a law; and if the words thereof bore a preciſe meaning in the 1446, the act behoved to be interpreted according to that meaning now. Tho' every retailer at preſent gets the name, improperly, of merchant, yet it was not ſo anciently; as is plain both from the *Roman* law, and ours. See *Horace*, 24th ode, book 3. and the act 67. 14th parl. *James* II. from which ſtatute it is plain, that *ſailors* and the *eſtate of merchandize* were underſtood to be ſynonymous terms, and which is further explained by the acts preceeding and following, whereby it is evident, that none was allowed *to ſail in merchandize, or to uſe merchandize by themſelves*, but freemen of boroughs, not being craftſmen. And as an exception confirms the rule in caſes not excepted; ſo the prohibition of craftſmen can extend no further than to the uſing of merchandize, and no man uſed merchandize in the ſenſe of thoſe laws, but thoſe who by themſelves or their factors dealt in export or import. And this likewiſe tends to explain the words in the decreet-arbitral *foreign merchandize*, eſpecially, as it is there oppoſed to the exportation of home goods. How ſoon retailers came to be dignified with the name of merchants ſeems uncertain; but from the whole tenor of our law it is plain, that nothing paſſed under the name of merchandize as far down as 1579 but foreign trade.

The Lords found that the ſuſpender, as a burgeſs, tho' a craftſman in any of the incorporated trades, may exerciſe the vocation of a vintner, by tapping and ſelling wines, and other liquors, for conſumption in his own houſe; and therefore ſuſpended the letters.

N. B. The above interlocutor was reclaimed againſt, but it does not appear from the Journal what deliverance was given thereon.

N° CCXXIV. *January* 28. 1743.

Colonel *Straton contra* the Magiſtrates and Town-Council of *Montroſe*.

No action lies on the ſtatute George I. *entitled an act for preventing tumults, &c. for forcibly carrying away grain or goods out of any houſe.*

IN the year 1741, a great many of the inhabitants of *Montroſe*, having broke into ſome girnels belonging to Colonel *Straton* within the ſaid town,

town, and taken a conſiderable quantity of meal therefrom, he brought an action on the ſtatute of *George* I. wherein he called the magiſtrates and town-council, as repreſenting the community, and concluded againſt them as ſuch for damages.

It was *pled* for the defenders, That no action was granted by the ſtatute againſt them as repreſenting the community; for that, according to the directions thereof, the concluſion ought to have been againſt the burrow; that is, the inhabitants thereof, who are made liable to make up the damages out of their own pockets; but that the community were not made liable to make up the ſame out of their common good. 2*dly*, No action lay on the ſtatute for any damage ſuſtained by the purſuer, thro' any part of the grain's being abſtracted, or damnified, the damage awarded by the act relating only to ſuch as are ſuſtained upon houſes or fabricks being demoliſhed, or attempted to be demoliſhed, but did not reach to the damage ſuſtained upon the goods that might be within the ſaid houſes.

The Lords ſuſtained the objection to the purſuer's libel, with reſpect to the concluſion againſt the magiſtrates; but, upon a reclaiming petition and anſwers, they repelled the objection; and likewiſe found no action lay on the ſtatute for damage ariſing for carrying off grain or other goods out of anyhouſe or out-houſe, but only for the damage done by pulling down ſuch houſe, &c

N° CCXXV. *January* 1743.

David Sutherland, in *Knockarthur*, contra *Thomas Grant of Auchoinanie.*

If the diet of a brieve of tutory is once deſerted, can the ſame brieve be, of new, executed to another diet?

DAVID SUTHERLAND took out a brieve for ſerving himſelf tutor of law to *Thomas Sutherland* of *Pronſie*, an infant, and his ſiſters, grand-nephew and neices to the ſaid *David Sutherland*, which was ſerved with a ſummons, upon letters of ſupplement, upon *Thomas Grant*, &c. as neareſt agnets to the infants, to compear before the Sheriff of *Sutherland* the 20th *May* 1742. *Thomas Grant*, &c. accordingly appeared on the ſaid day, and objected to *David Sutherland*'s capacity to manage the office he claimed, it being notourly known he was not even fit to manage his own affairs. But the raiſer of the brieve did not appear; whereupon the ſheriff deſerted the diet, and appointed the brieve to be of new ſerved, before any further procedure be had thereupon.

Thomas Grant, &c. ſuſpecting that *David Sutherland* might cauſe the brieve to be of new executed, and get a ſervice huddled up, when they might not be preſent to object, advocated the cauſe and *pled*, That the ſheriff had done wrong in ſuppoſing that the ſame brieve could be of new executed, which was a thing never practiſed, for the brieve is exhauſted, and has its full effect, as well as a procuratory of reſignation, or precept of ſeiſin, by being once executed, and therefore the ſheriff ought to have deſerted the diet *ſimpliciter*. And the reaſon is, becauſe all brieves, whether pleadable or not, are in order to the trial of a fact by a jury; and in all trials by juries the diets are peremptory, that neither the

the members of inqueſt nor parties concerned, may be vexed with unneceſſary attendance. If indeed the purſuer had appeared, and had produced the brieve with the executions, the trial, upon cauſe ſhown, might have been adjourned, as happens frequently in brieves of mortanceſtry; but where there is a total diſcontinuance of the proceedings, as in this caſe, and the diet deſerted, the inſtance totally falls; the brieve itſelf, which is a writ of ſummons, periſhes, and cannot be revived, or be the warrant for a new execution; but if the thing be ſtill competent that was intended by it, a freſh brieve muſt be taken out of the chancery for the ſame purpoſe.

The Lords remitted to the Lord Ordinary to advocate the cauſe.

N° CCXXVI. *February* 2. 1743.

Margaret Peadie, eldeſt Heir-portioner of *Ruchill*, contra *Grizel*, &c. *Peadies*, the other Heirs-portioners.

The principal dwelling-houſe or meſſuage, &c. belongs to the eldeſt heir-portioner, without any recompence to the other heirs-portioners.

THE queſtion betwixt theſe parties reſolved into a neat point of law, *ſcil.* Whether the manſion-houſe, office-houſes, and gardens on the lands of *Ruchill* ſhould belong to the purſuer, as the eldeſt heir-portioner, without any conſideration or recompence to be given to the other heirs on that account.

The ſubſtance of the arguments for the eldeſt was, That the brief of diviſion concerned only ſuch ſubjects as admitted of a diviſion, and by no means ſuch as were in their own nature indiviſible; conſequently, theſe laſt did, by the feudal law, *jure præcipui et primogenituræ*, neceſſarily belong to the eldeſt heir-portioner without diviſion, and without any recompence to the other *puiſne* heirs-portioners; that the want of a head in the brief to enquire into indiviſible ſubjects, and to afford a recompence from the eldeſt, carried alongſt with it a ſtrong evidence, that no ſuch thing was known in the law of *Scotland* at that time. That it was certain, indiviſible ſubjects, ſuch as ſuperiorities, juriſdictions, towers and fortalices, fall to the eldeſt without any recompence, and why a manour-place, the principal meſſuage of the family, ought not to paſs in the ſame manner, is not eaſy to diſcover: Nor can it make any difference that it may admit of a value, as the purſuer knows of no patrimonial ſubject, which will not admit of a value. Beſides, it ſeems inconſiſtent that the principal meſſuage ſhould be retained by the eldeſt, *pro dignitate primogenituræ ſuæ*, and at the ſame time ſhe ſhould be laid under a burden of purchaſing that right for a price, whereby ſhe would be in a worſe caſe than any of the reſt, as the expence of repairs, and rights of hoſpitality, would remain on her.

It may admit of a different conſideration, if it is only a tenant's houſe, and no principal meſſuage, ſeeing ſuch may be divided, as two tenants live frequently under the ſame roof; or, if that could not be done, ſo much more of the land might be aſſigned to the other heir-portioner, for building another ſteading, and anſwering the expence

which might be laid out upon the ſame. See 12th *November* 1696, *Hathorn*; 5th *March* 1705, *Cowies*; *Stair*, *lib.* 3 *tit.* 5. § 11.

The ſubſtance of the reaſoning for the other heirs-portioners was, That they had all an equal intereſt in the houſe as well as the lands: that the houſe can, in no ſenſe, come under the deſcription of a tower or fortalice, which being conſidered as acceſſories to juriſdiction, *et ſeparata jura* from the lands, have been thought to fall to the eldeſt heir, excluſive of the reſt; but the one in queſtion was lately built by the father of the contending parties for his accommodation a few months in the ſummer-time: that anciently a ſtrict equality was obſerved in all ſucceſſion, whether male or female. Primogeniture with us, has prevailed as to the firſt; but, among females, the general rule is ſtill obſerved, and which will not be preſumed to be departed from further than is proved. Where a ſubject does not admit of diviſion or eſtimation, the eldeſt muſt have it; but if it does admit of eſtimation, the law reſtores the ſucceſſion to its natural equality, by giving a value to the other heirs-portioners, in place of that ſhare of the ſubject they were intitled to; but which, by its being indiviſible, they could not literally enjoy. Of the firſt, are titles of honour, juriſdictions, and ſuch ſuperiority as do not yield a certain liquid rent to the ſuperior; but where ſuch rent is paid to the ſuperior, altho' the ſuperiority in that caſe will not divide more than any other; and altho' it muſt neceſſarily draw the feu-duty alongſt with it to the eldeſt, yet ſhe muſt give a recompence therefore to the reſt for their ſhares of the feu-duty, wnich is a certain rent, and admits of a proper eſtimation. The queſtion is, under which of theſe a meſſuage falls to be ranked? It is admitted, that it cannot be divided no more than a feu-ſuperiority; but ſtill it remains to be aſked, why, as in the one caſe, ſo alſo in the other, a recompence ought not to be given, a dwelling-houſe may admit of a value, with as much certainty as a feu-ſuperiority? See *Reg. Maj. lib.* 2. *cap.* 27. *Skene de verb. ſig. cap.* 27. *Craig*, *lib.* 2. *dieg.* 14. § 7. *Hope*'s Practicks, *tit. de jure noſtro de ſucceſſionibus*, § 7. 2d *December* 1669, *Monteith*; Sir *George Mackenzie Inſt. tit.* Succeſſion of heritable rights, § 25. Heirs-portioners of *Carnock* 1730.

The Lords found, That the manſion-houſe, office-houſe and garden, belonged to the eldeſt heir-portioner, without any recompence to the other ſiſters.

N° CCXXVII. *February* 9. 1743.

Creditors of *Agnes Hamilton*, contra the Repreſentatives of *James Henry*.

THE *ACT* 1696.

THE ſaid *James Henry* entered into a minute of ſale with the ſaid *Agnes Hamilton*, and two others, whereby they diſponed to him a houſe in *Edinburgh*; and one of the articles was, That *Henry* ſhould be allowed to retain as much of the price as ſhould pay him two debts due by one of the diſponers. *Agnes Hamiltons* creditors brought a reduction of the minute, upon the act 1696, *alledging*, That ſhe was bankrupt at the date thereof; and, for verifying their alledgeance, condeſcended on this

this fact, *Jcil.* that ſhe had been incarcerate about ſix months before the minute of ſale, in the tolbooth of *Edinburgh*, in virtue of a caption, at the inſtance of *John Miln.*

Anſwered, That the debt due by *Agnes* to *John Miln* was paid and diſcharged, and ſhe liberate ſix months before the deed under challenge was granted: this being the caſe, ſhe cannot be reputed a notour bankrupt, unleſs ſhe ſhall be held to be ſuch upon one of the three joint grounds, which the law requires, without the concurrence of either of the other two. The ſtatute ſuppoſes, That, at the time of granting the deed, the granter is a dyvour, or bankrupt, in terms of the deſcription therein laid down. This muſt be admitted with reſpect to one of the requiſites in the act, *viz.* inſolvency; that that muſt come down to the date of the deed under challenge; as it would be abſurd to ſuppoſe, that a reduction could proceed on this ſtatute, of a deed granted by a perſon not ſolvent, or that an anterior inſolvency which may have happened twenty or thirty years before, ſhould have any influence to ſet aſide a deed granted by a man who is at the time in good circumſtances.

In the *ſecond* place, There was no partial preference granted by *Agnes* to her anterior creditors, which can fall under the law, the debts for which retention of the price is allowed being due not by her, but by one of the other diſponers.

Replied for *Agnes Hamilton*'s creditors, That the payment of the debt in the caption, cannot influence the caſe, if the bankrupt was once impriſoned thereon, or eluded the diligence by any other of the qualifications in the ſtatute; for, ſure the payment of the debt cannot hinder the fact to be true, that ſhe was impriſoned thereon, or fell under any other of the qualifications reſpecting the diligence. And it is a miſtake to ſuppoſe, That the remedy introduced by the ſtatute, was only intended for the behoof of the party at whoſe ſuit the diligence proceeds: as every creditor whatever may take the benefit thereof, in order to reduce the deeds granted thereafter; and, if the defender's gloſs on the act were to hold, it might be cancelled; as the party, who gets a voluntary right from a bankrupt, would have no more to do, in order to ſecure that right, but to take off the creditor who uſed ſuch diligence, by payment of his debt, perhaps a mere trifle, a few days before taking the deed. With reſpect to the 2*d* point, it was *anſwered*, That it would be abſurd, if a deed in ſatisfaction, a ſecurity of any debt of the bankrupt's ſhould be voided, and yet a gratuitous deed in favours of the creditor of another ſhould ſubſiſt: beſides, when the bankrupt aliens any of his effects to a creditor of his own, that debt is thereby ſatisfied, and his remaining effects left open to the reſt of his creditors; whereas, when he does the like to a creditor of another, it is downright profuſion, and his own creditors altogether thereby prejudged.

The Lords found the Act of Parliament did not take place.

N° CCXXVIII.

N° CCXXVIII. *February* 16. 1743.

Goodlet of *Abbotſhall*, contra *Lennox* of *Woodhead*.

If it is neceſſary to notify to a country gentleman, that the furniſhing was made to another, conform to his letter of credit?

ANDREW LEES merchant in *Glaſgow* intending to purchaſe ſome victual from the deceaſed *James Goodlet* of *Abbotſhaugh*, applied to *John Lennox* of *Woodhead* his brother-in-law, to become bound for him, as *Lees* was a ſtranger to the ſaid *James Goodlet*; whereupon he wrote a letter to Mr. *Goodlet* in theſe terms: "Sir, My friend, Mr *Lees*, tells me, "he is wanting to buy about 100 bolls bear; and, as he is a ſtranger to "you, it is, what I aſſure you, that you may deal with him ſafely; and, "what he and you agrees on, I ſhall ſee you paid, if it were for 500 "bolls."

In purſuance of this letter, *Andrew Lees* received the 100 bolls bear from Mr *Goodlet*, at the price of 10 merks, payable at *Candlemas* 1737, the bargain being in *July* or *Auguſt* 1736.

Mr *Goodlet* having died, the preſent *Goodlet* of *Abbotſhaugh* his executor, brought an action againſt *Andrew Lees*, and alſo againſt *Woodhead* his cautioner, for payment of the price of the 100 bolls of victual.

The defence offered for *Woodhead* was, That he could not be liable; becauſe neither the purſuer, nor his author, had timeouſly notified to him the furniſhing any bear to Mr *Lees*; for, tho' the letter is dated in *July* 1736, yet he got no notification of the bear's being furniſhed until *November* 1738, when the ſummons was execute againſt him, at which time *Lees* was bankrupt, his creditors before that having adjudged his whole eſtate.

Anſwered, If the defender had granted a bond to ſee the price of the bear paid, no intimation of the furniſhing would have been neceſſary; and there is no difference betwixt that and the preſent caſe.

Obligations for factors, and for the due performance of an office, are common, and commonly given before any thing is due, and in none of theſe caſes is notice neceſſary. If a man ſends a letter, and deſires another to deliver a bag of money to the bearer, muſt he who delivers, in conſequence of the letter, ſend notice to the writer that he has given it? No, The letter was a ſufficient warrant; and whatever becomes of the thing delivered, it is an exoneration to him, who acted upon the faith of the letter. Indeed, among merchants who are bound to keep regular books, which remain an evidence of their tranſactions, and which often bear faith, notices are required; but, to introduce them into the common tranſactions of life, would be attended with inſuperable difficulties. The purſuer never heard that one who lends money, was bound to intimate to the cationer, that the money was lent until he aſked it by a charge of horning. And indeed, a perſon who becomes cautioner for a bargain to be made, relies upon nothing to be done by the ſeller, but that he will truſt the buyer, and the writer of the letter of credit, in that caſe, is not to be the firſt payer, as among merchants, but truſts to the buyer, both for notice that the cautionry-obligation

is

is accepted of, and that he will pay and perform his bargain. See 10th *February* 1682, *Falconer*.

Replied for the defender, That the letter purſued on, was plainly of the nature of a letter of credit, and in *re mercatoria*, relating to the ſale of bear, a mercantile ſubject, and given in favour of *Andrew Lees* a known merchant; it is acknowledged, that notice would have been neceſſary among merchants; nor can it make any difference that it was wrote by a country gentleman, ſeeing ſuch are not exeemed from due negotiation of bills. The neceſſity of timeous intimation, depends upon a principle that is common to all men; that it is proper that the granter of the letter of credit be acquainted, how far his credit is uſed, to the intent that he may take care to be reimburſed in due time by the uſer of the credit; for, if the uſer of the credit ſhall fail, before the granter know of the credit's being uſed, he who furniſhed the credit is to blame; ſeeing, if the furniſhing had been notified, the writer of the letter might have provided for his own relief in due time. See *Forbes's* treatiſe upon bills of exchange, *p.* 13. 7th *January* 1681, *Ewen*.

The Lords found no neceſſity of an intimation.

Nº CCXXIX. *February* 18. 1743.

Katharine Thompſon, contra *Gilbert Lawrie*, Defender.

A clauſe in a marriage-contract, diſcharging all claims competent to the wife, or her neareſt of kin, in the event of the husband's deceaſe, what effect has it, in caſe the wife predeceaſe the husband?

BY contract of marriage betwixt the ſaid *Gilbert Lawrie* and *Helen Thompſon*, he provided her in the liferent of 1000 merks, in caſe ſhe ſurvived him, *&c.* "which proviſion ſhe accepted in full of all terce of "lands or annualrents, third or half of moveables, conqueſt, and all "others, ſhe, her executors, or neareſt of kin could claim, by and "through the deceaſe of the ſaid *Gilbert Lawrie*, any manner of way, "excepting his good will only." For the which cauſes ſhe aſſigned him to two ſeveral jointures ſhe had by former huſbands; and ſhe having died without leaving any iſſue of that marriage, *Katharine Thompſon*, a daughter of her's by a former marriage, brought an action againſt *Gilbert Lawrie*, for an accompt and payment of her mother's ſhare of the moveables.

Pled for the defender, That the defunct's right was, by the above clauſe in the contract, tranſacted upon and diſcharged, and could not deſcend to her executors. In ſupport whereof, the defender offered to prove, by ſuch of the communers at this ſettlement as were ſtill alive, that the whole claims, which either his wife, or her executors, could have upon his moveables, were underſtood to be tranſacted upon and diſcharged; and as this was undoubtedly the intention of parties, neither could the clauſe admit of any other conſtruction; for *Helen Hutchiſon* accepted the proviſions ſtipulated in full, not only of her terce of

lands, which would have been excluded by a proviſion of liferent, tho' not expreſſed, but alſo, in full of her third, or half of the moveables which fell under the communion: ſhe tranſacts upon her intereſt in the communion; and if that intereſt was renounced and extinguiſhed, ſhe could have no claim to a diviſion of the moveables upon the diſſolution of the marriage, and conſequently no claim could deſcend to her neareſt of kin: for it was a claim that did not take its riſe from the diſſolution of the marriage, whether by the death of one party or another, but was founded on the communion, or *ſocietas mobilium*, which the law eſtabliſhes amongſt married perſons; which, if renounced or diſcharged at entering into the marriage, the foundation of the claim is totally cut off; and it can have no effect in favour of the wife's repreſentatives. If the clauſe had gone no further than to declare *Helen Hutcheſon*'s acceptance of the proviſions in the contract, in full of all teree of lands or annualrents, and third or half of moveables, there could have been no doubt that her intereſt in the communion being once excluded, could not revive again in favours of her executors, unleſs it had been ſo provided; nor can any ſuch proviſion or reſervation be inferred from the following part of the clauſe. *And all others, ſhe, her executors, or neareſt of kin can claim, by and through the deceaſe of the ſaid* Gilbert Lawrie, *any manner of way, excepting his good will only.* For, by it, the claim of the wife, and of her neareſt of kin, are diſtinguiſhed from one another; the laſt can be underſtood only to take place upon her predeceaſing her huſband, as the firſt does upon her ſurvivance. They have no claim to divide the huſband's moveables, but upon the wife's predeceaſe: if ſhe ſurvives, that claim is competent to herſelf, and not to her neareſt of kin; ſo this addition ſhows, that the claim which is competent to the wife's neareſt of kin upon the diſſolution of the marriage, was actually under the view of the parties, and meant to be comprehended under this diſcharging clauſe. See *Fountainhall*, 12th *July* 1701, Executors of *Boyes*; and 25th *July* 1738, *Freebairn*.

Anſwered for the purſuer, That, during marriage, the wife might not improperly be termed joint proprietor with the huſband, tho' it is, in reality, but a *quaſi dominium*; as he has not only the adminiſtration, but the total diſpoſal of the fee. Upon the diſſolution, however, of the marriage, the huſband's prerogative ceaſes, the ſociety is at an end, the communion is diſſolved, and the wife's ſhare of the property comes to have its full force, when a diviſion of the ſubſtance falls to be made. Thus the law ſtands, except where there is a paction to regulate or renounce, in whole, or in part, the reſpective rights of huſband or wife, *e. g.* the defender might have renounced his *jus mariti*, by the contract, to one of the jointures his wife had, which, ſurely, would not have cut him out of the other. This caſe is the ſame with the preſent, at leaſt, it is very ſimilar; for it is obvious that the renunciation in the clauſe, is ſingly calculated for the event of the marriage's being diſſolved *by or through the deceaſe of the husband*, from which the other is a far different event, when it is diſſolved by and thro' the deceaſe of the wife; for, in this caſe, by the common law, the diviſion muſt be made againſt the huſband ſtill living, who muſt himſelf exhibite the goods, and ſubmit to a partition thereof. Now, how is it poſſible to conſtruct a renunciation, in the event of the husband's deceaſe, to diſcharge or cut off a claim competent by the law againſt the huſband ſtill living; and as the two caſes are different, ſo the

reaſon

reaſon of the difference is ſolid; for the wife may conſent, in caſe of her ſurvivance to accept the jointure which then takes place, in full of her ſhare of the moveables; becauſe, in that event, ſhe may take a full equivalent for what ſhe has renounced by the jointure; whereas, in caſe of her predeceaſe, all that ſhe brings to her huſband is by him taken, without any recompence, unleſs her executors remain intitled to take her ſhare of the moveables, accruing to them upon her death. See, 31ſt *January* 1663, *Forſyth.* As to the defender's offering to prove by witneſſes what paſſed at the ſettlement; it was *anſwered*, The ſame was neither true nor competent, ſince the articles as they ſtand, and were perfected by the parties in writing, muſt be the rule. And as to what is ſaid, that the wife's total intereſt in the communion was renounced, and conſequently no claim could deſcend to her repreſentatives; it was *anſwered*, That, taking the whole clauſe together, it was plain, it was only renounced in a certain event; if, indeed, ſhe had renounced all terce of lands, third, or half of moveables competent to her, *by and thro' the ſaid marriage*; ſuch words would have operated a total extinction or renunciation of the wife's right, as that comprehends all poſſible events; whereas, the words, *by and thro' the deceaſe of the husband*, is quite another thing, and comprehends only one event.

The Lords repelled the defence, and found the purſuer not excluded by the contract of marriage, from elaiming a ſhare of the goods in communion, in the event of the wife's predeceaſing the husband.

But, on adviſing a reclaiming petition and anſwers,

The Lords found, That Helen Hutcheſon *having accepted the proviſions made her in the contract of marriage, in place of all third, or half of moveables, conqueſt, and all others, ſhe, her executors, or neareſt of kin can claim; that her neareſt of kin are thereby excluded from any claim to a ſhare of the huſband's moveables; and that the words,* [*by aad thro' the deceaſe of the ſaid* Gilbert Lawrie], *cannot be underſtood to reſtrict the former clauſe, ſo as that the executors ſhould only be excluded in the event of the huſband's predeceaſe; ſince, in that event, the executors, or neareſt of kin, would have had no claim to any ſhare of the husband's moveables; but that the ſaid words, by and through the deceaſe of the ſaid* Gilbert Lawrie, *do apply to the wife herſelf, and not to her neareſt of kin; and aſſoilzied.*

N° CCXXX. *February* 18. 1743.

David Logan, contra *George Glaſgow* of *Nethermains*.

Upon whom lies the expence of repairing a manſe, which is not declared ſufficient at the miniſter's entry.

THE manſe of *Kilwinning* needing repairs, the preſbytery of *Irvine* impoſed a ſtent on the heritors, for repairing the ſame. *Nethermains*, one of the heritors, ſuſpended the preſbytery's decreet.

For

For the Suſpender, it was obſerved, That, at the tranſportation of the former miniſter in the 1718, he was burdened with the payment of L. 3 : 11 : 0 Scots at his removal; and, upon payment thereof, the preſbytery declared it ſufficient, which they never would have done, if it had not been declared a ſufficient manſe at his entry, altho' the ſuſpender can bring no direct proof thereof. In *March* 1721, the day before Mr *Ferguſon* the preſent miniſter's ordination, ſworn viſitors were appointed by the preſbytery to viſit it, who reported, that it would take L. 87 Scots to repair it: upon this they applied to the patron for his aſſiſtance, who had three years vacant ſtipend in his hands. Accordingly he laid out above L. 500 Scots on the repairs. Theſe facts premiſed, it was *pled*, in point of law, That it was a natural burden on every poſſeſſor to uphold and repair the houſe he dwells in, where there is no paction to the contrary; witneſs the caſe of liferenters and tenants, which muſt hold equally in the caſe of miniſters. 2*dly*, Our ſtatute-law goes on that plan, as appears from the 21ſt *act*, *Parl.* 1663, which declares, "That manſes being once built and repaired, ſhall be upholden by the "incumbent miniſter during his poſſeſſion, and by the heritors in time "of vacance, out of the vacant ſtipend." From which it is plain, that if the vacant ſtipend is paid to the patron, the reparations muſt reſt upon him. In ſhort, the miniſter ought always to repair the manſe during his incumbency, and the patron during the vacancy, until it is ſo deteriorated by time, as to make it neceſſary to rebuild it, which, no doubt, is a burden on the heritors.

From all which it was obvious, That as the manſe was declared, or ſuppoſed to be ſufficient, on paying L. 3 at the removal of the former miniſter; and that the patron laid out a great ſum on it during the vacancy, Mr *Ferguſon*, the preſent miniſter, ought to uphold it.

Anſwered for the charger, (who was collector appointed by the reſt of the heritors) That the ſuſpender's ſon was preſent at the viſitation for his father, when he not only made no oppoſition, but even approved of the ſtent impoſed on the heritors by the decreet, as did all the reſt of the heritors: which was a ſufficient anſwer of itſelf to all the defences againſt the ſtent's taking effect. And with reſpect to the grounds of law, it was allowed, that a manſe ought to be kept in repair during the vacancy out of the vacant ſtipends, but during the incumbency, the miniſter is not otherways liable, than in the caſe that he gets it in a ſufficient condition; and that it be ſo declared by an act of the presbytery. It is true, that by the clauſe of the act 1663, above quoted, the heritors muſt give the miniſter a ſufficient manſe at his entry, and cuſtom, which is the beſt interpreter of laws, has always conſtructed it ſo as the ſame ſhould not only be ſufficient at his entry, but that it ſhould be ſo declared. Nor can the ſpecial circumſtances condeſcended on, vary the queſtion; for a manſe may be repaired twenty times, and yet, after all, never be a ſufficient houſe; which is really the caſe of the preſent one.

Replied, There was no foundation in any ſtatute for freeing a miniſter from the natural obligation to uphold his manſe during his incumbency, becauſe there was no judicial declaration of its ſufficiency the time of his entry. 2*dly*, By the act 1663, the heritors are not otherwiſe made liable to uphold the manſe than out of the vacant ſtipends in their hands; and if the vacant ſtipends was not allowed to remain with them, but uplifted by the patron upon a legal title, there remains no longer any obligation

gation upon them to uphold the manſe during the vacancy. In a word, if the patron did his duty, the miniſter becomes liable for the ſum decerned for reparations, or if there was any failure on his part, the heritors ought not to ſuffer by his fault, but he alone ought to be liable.

The Lords, in reſpect the ſuſpender's ſon was preſent without objecting to the decreet, found the letters orderly proceeded.

N°. CCXXXI. *February* 19. 1743.

Margaret Garden, Relict of *Gilbert Stewart*, Merchant in *Edinburgh*, contra *John Stewart*, &c. Repreſentatives of the ſaid *Gilbert*.

A relict's claim to aliment and mournings, if cut out by the terms of a contract of marriage which diſſolved within year and day.

THE ſaid *Gilbert Stewart*, having married *Margaret Garden*, he, by a poſt-nuptial contract, provided her in L. 30 of annuity, in caſe ſhe ſurvived him, and, in the ſame event, he obliged himſelf to pay her a 1000 merks for her ſhare of the houſehold-pleniſhing; which proviſions ſhe accepts " in full of all ſhe and her neareſt of kin can claim, or de-" mand for terce of lands, third or half of moveables, executry, and others " whatſomever, from the ſaid *Gilbert Stewart*, &c. After which ſhe aſ-" ſigns him to a jointure ſhe had by a former marriage." and then follows this clauſe, " And both parties agree and declare, that theſe pro-" viſions on both ſides ſhall ſtand in full force, notwithſtanding the " marriage ſhall diſſolve by the death of either of the parties, within " year and day, without a living child." *Gilbert* died about ſeven weeks after the marriage; whereupon ſhe brought a proceſs before the commiſſaries of *Edinburgh*, for alimenting the family until the next term, and for mournings. The Commiſſaries " found her intitled to mournings, " and to the maintenance of the family, and allowed a proof of the " ſame, reſerving modification."

The repreſentatives offered a bill of advocation, and *pled*, That it was a fixed principle in our law, that when the marriage diſſolves within year and day, *&c.* every thing returns *hinc inde*. It is true, that of later years, practice has prevailed, of diſpenſing with the law in this particular, by a ſpecial *proviſo*; but where no ſuch diſpenſation is made, the law ſtands as it did. Upon the ſame principle, it muſt be admitted, that it is optional for the parties to diſpenſe with the ſame, in whole or in part. If the diſpenſation is total, the proviſions, whether legal or conventional, muſt take place in their full extent, as if the marriage had ſubſiſted beyond the year: if but partial, the diſpenſation will have its full effect, ſo far as the paction goes, and no further. To apply theſe obſervations to the caſe in hand; it does not appear from the above contract of marriage, that there is any ſuch *proviſo* in it, as that, in caſe of the diſſolution of the marriage within year and day, the party ſurviving ſhould be intitled to every proviſion legal or conventional, competent by law, as if the marriage had not ben ſo diſſolved: on the contrary,

the *proviſo* is moſt ſpecial and limited, That the particular proviſions, as covenanted *hinc inde* in the marriage-contract, ſhall ſtand in full force, notwithſtanding the marriage diſſolve within year and day: ſo that the diſpenſation is plainly ſo circumſcribed, as to reach no farther than the ſpecial proviſions contained in the contract; and therefore, as to every other particular, the law ſtands as it did. It is ſubmitted, therefore, if the relict is not debarred from any ſuch claim by the expreſs words of the contract, whereby ſhe accepts of the proviſions therein ſpecified, *in full of all that ſhe, or her neareſt of kin can claim or demand for terce of lauds, third or half of moveables, and others whatſomever*, &c. Are not the particulars now inſiſted for, a claim which ſhe makes againſt her huſband's eſtate? and if ſuch, are they not ſpecially excluded by the expreſs words of the above clauſe?

The Lords refuſed the bill of advocation.

Nº CCXXXII. *February* 22. 1743.

Hugh Earl of *Marchmont* contra *John Fleeming*.

It is not neceſſary to warn a ſubtenant who poſſeſſes under a tackſman, whoſe leaſe excludes aſſignees. 2. *Nor to ſummon him to remove on ſix days.*

ANNO 1725, the late Earl of *Marchmont* let a tack of ſeveral mills, *&c.* to *James Rae*, and his heirs, ſecluding aſſignees, for the ſpace of ſeven years, and in the 1733, he renewed the leaſe in the ſame terms. On the 22d of *Auguſt* 1741, *Rae* renounced this leaſe, upon which Lord *Marchmont* granted a new leeſe to *John Hunter* of this poſſeſſion, to commence *quoad* the mills at the *Lammas* preceeding, and *quoad* the lands at the *Martinmaſs* thereafter.

When *Hunter* came to take poſſeſſion, *John Fleeming* oppoſed it, as having a ſubſet from *Rae* of the mill, *&c.* of which he had been in poſſeſſion many years. Whereupon the Earl lodged a complaint againſt *Fleeming* before his baron-bailey, who decerned him to remove from the mill againſt the 28th of the ſaid month of *Auguſt*, and from the land at *Martinmaſs* thereafter; he ſuſpended, and *pled*, That *James Rae* the principal tackſman could not renounce to his prejudice, eſpecially betwixt terms, ſo as to expoſe him to be violently thrown out, who poſſeſſed the lands originally, by virtue of a written ſubtack, and continued therein by tacit relocation.

That the act 1555, anent warning of tenants, ordains, That in all time coming the warning of tenants, and others, to flit and remove from all lands, *&c.* ſhall be in manner as therein ſet furth, which comprehends ſubtenants to tackſmen, that have no power to ſet. Which the ſuſpender does not admit is the caſe here, as the tack only excludes aſſignees. And whether he is a tackſman or putative heritor who aſſumes that power, does not alter the caſe; the poor tenant is not preſumed to look into the ſetter's right, but only his being poſſeſſor of the ſubjects ſett. It is true, that after a ſetter's right ceaſes, the maxim will take place *reſoluto jure dantis*, &c. the right from him muſt give way, and thereby the proper owner would

would have power to warn and remove a tenant, notwithſtanding of a tack for years to run, from a perſon who had no right to ſet the ſame; but ſtill there muſt be a regular warning uſed. Thus, in the caſe of a liferenter ſetting a tack for a number of years, and dying before the end of the term, the tack is at an end by her death, and yet the tenant cannot be ſummarily removed; and much leſs betwixt terms, as in this caſe. Further, the ſtatute requires, that all ſummons of removing be upon ſix days; but the ſuſpender had not ſix hours, he being cited and decerned all in one day, which was great oppreſſion; eſpecially, as he had poſſeſſed and paid rent to the tackſman for fifteen years; ſo could not be deemed an intruder, or violent poſſeſſor.

Anſwered for the charger, That tacks are *ſtrictiſſimi juris*, and can neither be aſſigned, or ſubſet, unleſs an expreſs power is given for that effect, which proceeds on this principle, or foundation in the *Roman* law, That a creditor cannot ſubſtitute another creditor in his place without conſent of the debtor, and ſo *vice verſa*. In like manner, if I oblige myſelf to diſpone my land to *Mævius*, I am not bound to aſſign to his aſſignee. It is true, a procuratory *in rem ſuam*, or an aſſignation may be effectual with regard to obligations relative to money or fungibles, but cannot anſwer the purpoſe in the caſe of perſonal preſtations, tacks, reverſions, or ſuch like.

This doctrine muſt hold *a fortiori* in the preſent caſe, where aſſignees are expreſsly excluded; under which no doubt muſt be comprehended aſſignees by a ſub-tack, who have a full right conveyed to them, as an aſſignee to the tack itſelf has: Nor do theſe different forms of conveying, make any difference *quoad* the landlord; becauſe in either caſe, the principal tackſman remains bound; and both are equally againſt the nature of the contract, by which there is a *delectus perſonarum*, the tackſman is choſen, and is bound himſelf to poſſeſs; therefore cannot devolve his poſſeſſion upon another. *2dly*, The privilege of warning is only beſtowed on lawful poſſeſſors; it would be abſurd to give it to a *mala fidei poſſeſſor*. No doubt a tack, ſet by a perſon in poſſeſſion *qua proprietor*, will defend until warning, becauſe the granter had the *jus poſſidendi* upon a colourable title; but ſurely a tack granted by one who never was in poſſeſſion, nor ever had a colourable title, is not ſo privileged; and one who takes an aſſignation, or ſubſet from him, cannot have a *bona fides*; but muſt know, that he is ſtipulating a thing the granter cannot give him.

And with reſpect to the complaint, that the ſuſpender ought to have had a formal ſummons of removing, it was *anſwered*, That he was no more intitled to that than to a warning; nay, it was not a clear point but he might have been removed *via facti*, as any other ſervant of the former tackſman might have been.

The Lords found the letters orderly proceeded.

The

N° CCXXXIII. *February* 1743.

Creditors of Mr *James Hog*, Lecturer in the *Tron-Church*, contra the Town of *Edinburgh* and the ſaid *James Hog*.

Whether the annualrents of a ſum mortified for the behoof of a lecturer in a church is arreſtable for his debts.

JAMES HOG being received lecturer in the ſaid church, was thereby intitled to the annualrents of L. 1000 Sterling yearly, which had been mortified for that purpoſe, his creditors arreſted the ſame in the hands of the magiſtrates.

In the furthcoming *Hog* appeared and *pled*, That the ſubject arreſted being a fund appropriated and ſet aſide for a certain purpoſe, could not, even by legal diligence, be diverted to any other purpoſes, ſo as to diſappoint the intention of the mortification. Indeed, where an obligation is granted to a man intirely for his own behoof, and where the debtor has no intereſt, other than to pay ſecurely, ſuch a ſubject is attachable by all ſort of legal diligence; but the caſe is quite different, where an obligation is granted *ad certum effectum*, and where the granter has an intereſt to ſee the money applied to the purpoſes for which the ſame is deſtined. In that caſe, as the money cannot be applied to other purpoſes, it cannot be affected with legal diligence, *e. g.* A ſervant's fee is not arreſtable, becauſe it is appropriated to the maintenance and ſupport of the ſervant, without which he would be incapable to perform his work; the maſter has a direct intereſt to apply the money this way, that he may have the benefit of the ſervant's work; and the ſervant has an intereſt, becauſe he is bound to perform his work, which he cannot poſſibly do if he has not his wages: the application of which to the preſent queſtion is obvious. It is true, this doctrine admits of a limitation; if the ſubject deſtinated and ſet aſide be more than ſufficient to anſwer the purpoſes, the ſuperplus may be attachable by creditors, becauſe the mortifier or debtor has no further intereſt than that the work be performed: And therefore if it ſhallbe thought that L. 50 is more than a ſufficient yearly aliment to *Hog*, he is willing the ſame be reſtricted to what leſſer ſum ſhall be judged may ſuffice for that purpoſe. See 18th *March* 1707, *Moliſon* ſupplicant. 9th *July* 1668, *Boag*.

The Lords remitted this cauſe to an Ordinary; but what was the iſſue of it, does not appear from any papers in the collector's hands.

N° CCXXXIV. *June* 9. 1743.

William Graham contra *John Coltrain.*

Import of a proviſion in a contract of marriage to the heirs of the marriage.

JOHN Stewart writer in *Edinburgh*, (afterwards of *Phiſgill*,) intermarried with *Agnes Stewart*, and, in the contract *anno* 1668, "ſhe "diſponed all her lands to him, and to the heirs to be procreate betwixt "them of the ſaid marriage, *&c.* And, on the other hand, he pro-"vided the whole he then had, or ſhould acquire, to the heirs thereof "in fee."

The contract contained a procuratory and precept by her, upon which the huſband was infeft in her lands. Of this marriage, there were ſeveral ſons and daughters; *David* the eldeſt ſon, died without iſſue before his father, as did *Robert* the 2d ſon, leaving a daughter called *Agnes Stewart*. *Anno* 1719, *Phiſgill* execute an entail of his eſtate, "in favours of himſelf, and the heirs-male of his body; which failing, to "the heirs-female of his body, and the heirs-male of their bodies, the "eldeſt heir-female ſucceeding without diviſion, *&c.*"

It contained alſo a clauſe "ſecluding and debarring the daughter "of *Robert Stewart* his ſon from ſucceeding to him in his lands and "eſtate, or any part thereof, in all time coming, and likewiſe the uſual "clauſes *de non alienando et non contrahendo.*" This tailzie was regiſtrate, and a charter and ſaſine followed thereon. Upon *Phiſgill*'s death, *William* his 3d ſon was ſerved heir of tailzie to him, and he dying without iſſue, *Agnes Stewart*, *William*'s eldeſt ſiſter, took up the eſtate in the ſame manner, who likewiſe dying without iſſue, *James Coltrain*, ſon of *Elizabeth Stewart*, the 2d ſiſter, ſerved heir of tailzie to his aunt *Agnes Stewart*.

Agnes Stewart the daughter of *Robert*, *Phiſgill*'s 2d ſon, being adviſed, that her grandfather and grandmother's eſtate was provided to the heir of the marriage by the ſaid contract, it was not in her grandfather's power to exclude her by the above ſettlement 1719, ſhe being the heir of the marriage, granted alongſt with her huſband Mr *Hathorn*, a truſtbond to the purſuer, who having charged her to enter heir of line and proviſion to her grandfather in his lands and eſtate, adjudged from her and her huſband, all their right to the eſtate of *Phiſgill*, and thereupon brought a reduction of the ſettlement 1719, upon the following grounds:

1*mo*, Becauſe *Agnes Stewart*, (Mrs *Hathorn*,) was the heir of the marriage by the contract 1668; therefore her grandfather could not exclude her by any voluntary or gratuitous deed, and that, ſuch was the above entail, whereby her uncle and aunts and their deſcendants, who were not heirs of the marriage, were preferred to her in the ſucceſſion.

2*do*, The ſettlement was directly in contradiction to, and *contra fidem* of the contract of marriage, in reſpect the heirs-male of the huſband's body, though of another marriage, are preferred to the heirs-female of the marriage, as alſo the heirs-female of another marriage, and his collateral heirs-male, are preferred in the ſucceſſion of the wife's eſtate to her heirs.

3*tio*, It was irrational, as it not only poſtpones Mrs *Hathorn*, the heir of the marriage, and his heirs at law to *William* his ſon, but likewiſe poſtpones her to all his daughters and their iſſue, and to his collateral heirs-male; nay further, excludes her for ever from the ſucceſſion, without giving her a ſhilling, though, at the date thereof, ſhe was an infant, and neither had or could have offended him.

And, in ſupport of theſe reaſons, it was pled, That as Mrs *Hathorn*'s father was the eldeſt ſon of the marriage, (upon the death of *David* his elder brother,) and was expectant heir thereof, ſo every right deſcendible to him, unleſs limited to heirs-male, did, upon his death, belong to her; and that it was impoſſible the character of heir of the marriage, could belong to her uncle or aunts, *&c.* while ſhe or her iſſue exiſted. That ſtipulations in a marriage-covenant, in favours of the heir of the marriage, as they are the conditions upon which the parties enter thereunto; as they are binding upon the parents and other parties contracters, ſo they eſtabliſh a right of credit in the iſſue of the marriage, not to be defeated by either of the parties contracters, nor by both concurring together: That the injuſtice of the ſettlement 1719, was obvious in many reſpects: To inſtance one of ſeveral, *Phiſgill*'s ſon of a ſecond marriage, had he ſurvived his wife, would have excluded all the female deſcendents of the marriage, not only with reſpect to the father's eſtate, but alſo *quoad* their mother's. Nor is it an anſwer to this obſervation, that the event did not happen, as the ſettlement muſt be conſidered as it ſtands; for it being one deed, cannot be divided, but muſt be reduced *in totum*.

Argued in defence, That proviſions to heirs and bairns of a marriage, are in common uſage underſtood equipollent; that the term *bairns* is exegetic of heirs; and that by our written feudal-law, heirs of one's body and children, are equivalent: And ſo it has been determined, not only in the caſe of a land-eſtate, but in proviſions of a ſum of money. At the ſame time, the governing rule in all ſuch caſes is, to conſider the intention of the parties contracters, whether they deſigned the proviſion to the eldeſt ſon only, or for the whole children equally. Now, if we interpret the above proviſion by this rule, it muſt be found to extend to all the iſſue of the marriage, notwithſtanding that the ſame is made to them under the character of *heirs of the marriage*. The whole the contracters then had, or ſhould acquire, was provided to the heirs of the marriage; and it would be inconſiſtent with the parental affection or preſumed intention of parties, to limit the ſame to the eldeſt ſon, who, in a ſtrict ſenſe, is the only heir, or to give him the whole in excluſion of the reſt. Wherefore, if this proviſion belonged equally to all the children of the marriage, the father had power to ſettle the ſame upon any one of them he chuſed to repreſent him, allowing reaſonable proviſions to the reſt. Now, in the preſent caſe, *Phiſgill* preferred his 3d ſon to the daughter of the 2d predeceaſed, and his own daughters likewiſe to her. This was a rational ſettlement, and ſuch as moſt men would chuſe to make; therefore, there is no ground for reducing it, eſpecially as the other children got rational proviſions, ſuch as they were content with. *Phiſgill* certainly fulfilled the obligation on him to provide his children of the marriage, by ſettling the eſtate upon any one of them, and giving the reſt ſuitable proviſions. *Robert* himſelf, while alive, was ſuitably provided for; ſo he could have had no claim; conſequently, his

daughter

daughter cannot impeach the ſettlement. Beſides, if needful, it can be proven, that *Phiſgill* had good grounds with being diſſatisfied with *Robert*'s conduct, and that of his wife's, ſo as not to chuſe their daughter for his repreſentative. See *January* 29. 1678, *Stewart*; *December* 16. 1738, *Campbell*; *Craig, lib.* 2. *dieg.* 14. § 11. *Stair, lib.* 3. *tit.* 15. § 19. *January* 20, 1725, *Adair*; *January* 1736, heirs-portioners of Miln; *January* 1737, *Trail.*

The Lords found, that the eſtate both of the husband aud wife, being provided by the contract of marriage betwixt John Stewart *and* Agnes Stewart, *to the heirs of the marriage, the ſaid* John Stewart *had no power to make the deed of entail* 1719; *and that the ſame was* contra fidem tabularum nuptialium, *and therefore reduced the ſame.*

N° CCXXXV. *June* 9. 1743.

John Clarkſon, Baker in *Edinburgh*, contra The Magiſtrates of *Edinburgh*.

Objection to an execution that the town-council ſhould have been cited as well as the magiſtrates of the town.

A mob having broke into ſome granaries in *Leith*, belonging to *John Clarkſon*, and taken a quantity of victual out thereof, he brought an action againſt the magiſtrates of *Edinburgh*, for themſelves and ſucceſſors in office, as repreſenting the community, upon the act of the 1ſt *George* I. entituled, *An act for preventing tumults*, &c. concluding, in the terms thereof, that they ſhould be found liable to him in damages; and cited the provoſt, bailies, dean of guild, and treaſurer of *Edinburgh*.

Objected to the execution, that the action was not regularly brought againſt the town, in reſpect the town-council was not ſummoned as well as the magiſtrates.

The Lords ſuſtained the objection, and found no proceſs. But the Purſuer having reclaimed, *The Lords ſuſtained proceſs, and repelled the objection to the execution.*

And the defenders having reclaimed in their turn, *The Lords found that the ordinary form of ſummoning burrows, by the law of* Scotland, *ſo as to make the community liable for any debt, is to ſummon the whole town-council, as well as the magiſtrates, and therefore ſuſtained the objection againſt the execution, and found no proceſs.*

N° CCXXXVI.

N° CCXXXVI. *June* 10. 1743.

John Shaw, Smith in *Greengair*, contra *Marion Ruſſell* Defender.

A bill bearing a clauſe of annualrent, from the date to the term of payment, is not void.

THE ſaid *John Shaw* being creditor to *Shaw* of *Weſter-Glentore* by bill, brought an action againſt the defender, as repreſenting the accepter, for payment.

Objected: The bill was void, as bearing a clauſe of annualrent from its date. See *February* 1741, *Paterſon* contra *Finlay*.

Anſwered: There were many deciſions ſuſtaining bills bearing a clauſe of annualrent, and the preſent caſe was nowiſe ſimilar to the one quoted; for there the bill bore a clauſe of annualrent in the ſame manner as if it had been a bond: but, in the bill purſued upon, it only provides, that a year's annualrent ſhould be paid at the term in the bill, which was a year from the date, of which the tenor follows: *November* 11. 1731, *Sir, againſt* Martinmaſs *next to come, pay to me, or my order, in the dwelling-houſe of* John Somervile *of* Glenhove, *the ſum of* 200 *merks and* 50 *merks* Scots *money, with the firſt year's intereſt,* 12 *and a half pounds* Scots *money, value in your hands*, &c. It was likewiſe obſerved to be the conſtant practice amongſt bankiers to add to the principal ſum the current intereſt, betwixt the date of the bill and the term of payment.

The Lords found the defender liable for the principal ſum and annualrents reſting unpaid, and in time coming, while payment.

N°. CCXXXVII. *June* 15. 1743.

Competition, Creditors of *Redhouſe*, with *Thomas Glaſs*, &c.

A proviſion to daughters and heirs-female, if good where the father had a ſon that ſurvived him.

CAPTAIN *Hamilton* of *Redhouſe* tailzied his eſtate to his ſon, and his heirs-male, *&c.* and, by a clauſe in the deed, he provided, "That, in caſe there ſhall be daughters, and heirs-female "procreate of his body, alive, at the time of his deceaſe; then, and in "that caſe, he obliged his heirs-male and tailzie therein ſpecified, to "pay the ſaid daughters and heirs-female, ane or mae, 10,000 merks, "to be equally divided amongſt them after his deceaſe. The Captain died leaving one ſon, and a daughter named *Helen*, who was married to Mr *Adam Glaſs*. In the ranking of the Creditors on this eſtate, *Helen*'s children claimed to be ranked for this 10,000 merks, provided by the foreſaid bond of tailzie, to be paid to the daughter, or heir female, procreate or to be procreate of Captain *Hamilton*'s body. *Hamilton*

Objected

Objected for the creditors, That the proviſion of 10,000 merks did obviouſly appear, from the ſcope of the deed of entail, to have been allenarly intended to take place in favours of ſuch daughter as was veſted with the character of heir-female of Captain *Hamilton*'s body, which could never apply to *Helen Hamilton*, the Captain's daughter, as there was one ſon, procreate of the Captain's body, who ſurvived his father: and that it was only meant to be effectual, in caſe they were excluded from the ſucceſſion to the lands of *Redhouſe* by a collateral heir-male, in virtue of the foreſaid tailzie, as a recompence to the daughters or heirs-female.

That, through the whole of the deed, the perſons intitled to this proviſion are uniformly deſigned *daughters and heirs-female*, conjunctively; which, in other words, imports that the proviſion was not intended for the daughter *qua* ſuch, but under the legal character of *heir-female*; ſo that both characters muſt unite in one perſon, before the proviſion could be claimed. In ſome caſes, the words heirs-female of a man's body, have been conſtrued as *tantamont* with daughters; but, in the preſent queſtion, the whole circumſtances do concur to inforce the legal and proper conſtruction of theſe words. It was further obſerved that, by the Captain's contract of marriage, the fee of the eſtate ſtood provided to the heir-male of the marriage; and, as he ſeemed very anxious to preſerve the ſucceſſion in the male-line, it was not preſumable he meant to burden his ſon with ſo exorbitant a proviſion to an only daughter; eſpecially conſidering that the whole yearly rent of *Redhouſe* was no more than L. 1000 *Scots*, at the date of the tailzie, and even that greatly burdened. In a word, it is plain the Captain only intended this proviſion as a ſatisfaction to his daughters, in the caſe of the eſtate's going by them to a collateral heir-male, as it is likewiſe evident from this, that he made no proviſion for younger ſons; which, it is natural to ſuppoſe, he would have done, at the ſame time, if he had intended to provide daughters *qua* ſuch.

Anſwered: As it was admitted, that, in ſome caſes, the words *heirs-female of a man's body* have been conſtrued as ſignifying the ſame thing with daughters. When, from the circumſtances of the caſe, ſuch appears to have been the intention of the donor, that the daughters ſhould take, though, properly ſpeaking, they were not *heirs-female*, it was plain, that *heirs-female* is an expreſſion frequently uſed inaccurately in contracts of marriage, and other writings, and often ſynonymous with the word *daughters*; and it is certain, that, generally ſpeaking, unleſs the contrary appear by other circumſtances, when a proviſion is made to daughters and heirs-female, the intention is that the ſame ſhall go to daughters. It is true, that when a proviſion is granted under two characters, clearly underſtood, and expreſſed by words having a certain and determinate meaning, both characters muſt concur; but yet certain it is, that the word *and* is ſometimes conſtrued *disjunctivè*, and not *copulativè*, and is taken to be the ſame as *or*; and therefore when two words *are* joined together, whereof the one has a determined meaning, the other a vague and undetermined one, in order to expreſs a creditor in a ſum; though they are tacked together by an *and*, the natural conſtruction is, that the one is exegetic of the other; and that the certain meaning of the one fixes the vague and undetermined ſignification of

the other, ſo as to be exegetic and not taxative. Neither was it an irrational deed in the Captain, as he gave not only his land-eſtate to his heir, but likewiſe his whole moveables; particularly, a bond for 8000 merks; and, if there had been never ſo many daughters, they would have got no more, though in the event there happened only to be one who had a right thereto: And, if the intention had been that the proviſion ſhould only be payable by the collateral heir-male, the ſum would have been made payable upon the ſucceſſion's opening to him, inſtead of which it is made payable upon the Captain's deceaſe; which ſhows he meant the proviſion ſhould be effectual, even though he left a ſon, in which caſe the daughters could not be *heirs-female* in a proper ſenſe.

The Lords found, That, by the conception of the clauſe in the tailzie, whereby the heirs of entail were obliged to pay to the tailzier's daughters and heirs female, one or more, the ſum of 10,000 *merks,* Helen Hamilton, *the only daughter of the maker of the entail, was intitled to the proviſion, in the event which happened of the tailzier's own ſon ſucceeding to the eſtate, as well as ſhe would have been intitled to the ſaid proviſion, if the eſtate had devolved upon the collateral heirs of entail.*

N. B. The above interlocutor was reclaimed againſt.

N° CCXXXVIII. *June* 17. 1743.

John Chriſtie, Tenant in *Callinch,* Charger, *contra Andrew Trail,* Suſpender.

Diſcharge; if it required to be on ſtamped paper?

THE charger being creditor to the ſuſpender by bill, of date the 26th *November* 1739, charged him for payment, who ſuſpended on this ground, That the bill charged on was comprehended under a general diſcharge granted by the charger to him the 14th *June* 1740, containing *a receipt of payment of all accompts, bonds, bills, clags and claims that ever were betwixt them, preceeding the date of the diſcharge.*

Anſwered for the charger, That the general clauſe in the diſcharge was inſert through the inaccuracy of the charger, an illiterate country man; and that it was not underſtood betwixt them at that time to have that meaning to comprehend the bill in queſtion, which he offered to prove. 2*dly*, *Objected*: That the diſcharge, not being on ſtamped paper, could not avail in law or equity. See the act 12mo *Annæ*. *Replied* for the ſuſpender, His reaſon of ſuſpenſion being verified by writing under the hand of the charger, the ſame cannot be otherwiſe taken off than by his own oath. 2dly, The diſcharge is not a deed of that kind which requires to be writ on ſtamped-paper. See *Wood*'s Inſtitutes.

The Lords found that the diſcharge did not require ſtamped-paper.

N° CCXXXIX.

N° CCXXXIX. *June* 17. 1743.

James Steedman, Merchant in *Kinroſs*, Purſuer, *contra Charles Coupar*, Sheriff-Clerk there, Defender.

Action of damages is competent before the court of ſeſſion, at a husband's inſtance, againſt a third party for debauching his wife, againſt whom he had obtained a divorce.

THE Purſuer having obtained a divorce againſt his wife, before the Commiſſars, for her adulterous practices with the defender, brought an action againſt him of damages, for reparation of the injury.

Pled in defence, That this proceſs was quite new and unprecedented in the law of Scotland; and however the nature of it may be diſguiſed by words, importing it to be a civil action for damages, yet in reality it was a criminal proſecution, for the alledged crime of adultery, tho' the court is not veſted with any ſuch criminal juriſdiction, as can authorize it to take proof of the alledged criminal practices, in order to convict the defender of adultery. If this proceſs is therefore of a criminal nature, it ſurely is not expedient or regular for the court to judge of it, in *prima inſtantia*. How far it might lye for recovering imaginary damages, after conviction before the juſticiary-court, may be doubted; as neither our law, authorities of our lawyers, or practice of our courts, have given any countenance to ſuch actions. But the preſent queſtion is allenarly, Whether before any ſuch proſecution is brought, a ſuit lies before this court in the firſt inſtance? With reſpect to which it is obvious, that the huſband and wife are the principal offenders in ſuch caſes, as being under the ſtrongeſt mutual obligations of chaſtity; conſequently, ſuch actions ſhould neceſſarily be directed primarily againſt the huſband or wife, which ever of them was guilty. Upon this principle it is, that when the huſband or wife are convicted, they loſe the proviſions to which they were intitled by the contract, or proviſion of law. And when proviſions were made with this particular view, it could ſcarcely have eſcaped the legiſlator to have taken ſome notice of the caſe of third parties, had ſuch ſuits as the preſent been deemed competent for imaginary damages. It would be a novelty ſurely in our law, to bring an action of aſſythment againſt a murderer before conviction; which muſt conclude *a fortiori* to the preſent point, where the law gives ſatisfaction to the injured perſon out of the effects of the principal offender. It is likewiſe one of the peculiar privileges of our law, that in all criminal matters, (petty delinquencies excepted) the perſon accuſed muſt be tried and convicted by his country. But if this attempt take place, this part of our conſtitution will be ſenſibly ſtruck at. It will not be conteſted, that where, from the ſame fact, there ariſes both a criminal and civil action, the one does not deſtroy the other. Now, ſuppoſe the defender ſhould be convicted, and decreet given againſt him for a certain ſum; could he be proſecuted next day before the juſticiary? it is believed, no man will think, that, for the ſame fact, he could be obliged to ſtand both trials before different courts: And if ſuch is the law, whence can this proceed? if it is not, that the action now carrying on before this court, is truly *actio penalis non rei perſecutoria*. No patrimonial pre-

judice ariſes from the fact charged againſt the defender, as in the caſe of theft, *&c.* tho' a conſequential imaginary damage may be qualified, on ſuppoſition the huſband takes the advantage of the law, and obtains a divorce, whereby he may want the aſſiſtance of his wife in the management of his family. But as ſuch conſequential damage does not ariſe immediately from the criminal fact, they cannot be the foundation of an action for imaginary damages, incapable of any certain eſtimation; which, in other words, is demanding a pecuniary penalty, by decreet of the civil court, without any proper conviction of the offender. Nor can the practice of the law of *England* avail the purſuer, as it is peculiar to that country; and even there ſuch actions are not purſued before the *Niſi prius* court, but are tried by a jury before the judge-criminal; where the jury are both judges of the fact and of the *quantum* of the damages.

For the purſuer it was *pleaded*, That it was impoſſible to figure an injury of a deeper dye, or more pernicious conſequences, than that of debauching a man's wife: That the nature of an injury did not depend ſo much upon the patrimonial intereſt that may be affected by it, as upon the real hurt and blemiſh that the injured perſon may ſuffer in his fame, in the eſtimation of the world, and with regard to the peace of his family: That all injuries, whether real or verbal, afford ſufficient ground of action, for reparation to the injured. If, indeed, only ſuch injuries as affect a man's eſtate could give a proper riſe to an action of damages, then all verbal injuries might be ſtruck out, ſince no man is a ſhilling the poorer for being called a rogue; conſequently, an injury of this nature could be eſtimated, and a proper reparation given to the injured perſon; otherwiſe this abſurdity would follow, that a man might be injured in the moſt ſenſible manner, and yet no reparation afforded to him in law. Further, there were obligations ariſing *ex delicto*, which were the mother of actions of a mixed nature, *partim pœnales, partim rei perſecutoriæ*; in which the injured party had his choice, either to inſiſt for reparation of the injury and damage in a civil way, or publickly, if there was a *publicum judicium* that concurred with it: And the only rule obſerved in inſtituting theſe actions was, that the ſame thing, whether a penalty or damages, could not be twice exacted, *ne bis idem exigatur*. By the civil law, which is likewiſe ours, the very attempting to debauch a man's wife afforded an action for redreſs, much more muſt the completion of the injury; and though ſuits of this nature have not been frequent in this country, yet they are well founded, though our antient law-books have not put any eſtimation upon ſuch injuries, as that muſt always be regulate according to the circumſtances of the caſe.

And, as this ſuit is only for damages, or reparation *ad civilem effectum*, the court is ſurely competent, even before convicting the defender, to cognoſce upon, and take proof of, the treſpaſs from whence this proceſs takes its riſe; otherwiſe, in the caſe of theft or robbery, reſtitution would be barred till the offenders were convicted before a criminal court. It is admitted, a treſpaſs of this kind affords an action upon the caſe in *England*, at common law; and it does not denote its being purely criminal, that the method uſed there for coming at the reparation is by a trial by jury; ſince, it is well known, that moſt civil cauſes are tried there in the ſame manner. See *l.* 1. § 2. *ff. de injur. et l.* 19. *ejuſd. tit.*

Huber

Huber, in his commentary on the *tit. De injuriis, lib.* 1. *tit.* 5. *Quib. modis feudum amittitur, et Reg. Majeſt. lib.* 2. *cap.* 12. § 7. *Skeen de verb. ſig. verb. Ænach.*

The Lords found the action competent.

N° CCXL. *June* 22. 1743.

John Crawford contra *William Mitchel.*

A portion being aſſigned by a wife to her husband in the marriage-contract, cannot be made furthcoming at the inſtance of a creditor of the husband's, unleſs he find caution to ſecure all her intereſt in the ſaid contract.

" BY contract of marriage betwixt *James Hog* and *Elizabeth Mitchel*, " he became bound to provide L. 166 Sterling, and to lay out the " ſame, with the ſum of L. 186 of tocher, (after aſſigned,) upon land, " bond, or other ſufficient ſecurity, and to take the right in favours of " himſelf and her, in conjunct fee and liferent, for her liferent-uſe al- " lenarly, and to the children of the marriage in fee, *&c.* And on the " other part, ſhe, in name of tocher, aſſigned to him and herſelf, in " conjunct-fee and liferent, for her liferent-uſe allenarly, and to the " children of the marriage in fee, L. 186 Sterling, contained in a bond " granted to her by *William Mitchel* her brother."

Mr *Crawford* being creditor to *Hog* for L. 35 Sterling, arreſted in *William Mitchel*'s hands the ſum due by him to his ſiſter *Eliſabeth.*

The defences *pled* againſt the forthcoming were, That the arreſter claiming in the right of *Hog*, whoſe only title to this money was the aſſignation in the marriage-contract, could be in no better caſe than his debtor; and, of conſequence, he behoved to claim his intereſt to be made forthcoming *tantum et tale* as it ſtood in *Hog*, ſubject to all exceptions and defences ariſing from the marriage-contract; from which it appears that the wife's portion was aſſigned upon the faith that *Hog* was in condition to join the ſum ſtipulated by him to the tocher, for the purpoſes of the marriage; which appear now not to have been true, as he was worſe than nothing, which behoved to ſtop all diligence for recovering the tocher until the mutual cauſe upon the huſband's ſide be *ſimul et ſemel* performed. And as the defender was, by the contract, entruſted with the execution thereof, he could not be bound to pay the tocher until the huſband ſhould be ready to lay out the ſame, together with the additional ſum mentioned as his own, in terms of the contract.

Anſwered for the purſuer, That, as the tocher was aſſigned to the huſband and wife, for her liferent-uſe allenarly, *&c.* he admitted that he could not crave to have this ſum made forthcoming to him, but with the burden of the wife's liferent; therefore he was willing to find caution to pay her the liferent of the ſaid ſum, in caſe ſhe ſhould ſurvive her huſband. In ſupport whereof, it was obſerved, That the mutual preſtation betwixt huſband and wife, did not ſtand *in nudis finibus contractis* to intitle the wife or her friends to withhold performance on their part till the huſband ſhould perform his part; but that the wife had, *de facto*, implemented her part, by aſſigning her tocher, whereby he became fiar of the ſum; after which there was nothing to bar the huſband's credi-

tors from attaching this ſum, as well as any other ſubject belonging to him. It is true, where a bride or her relations become bound to pay a certain tocher, neither the huſband, nor his creditors, can inſiſt for payment, until the huſband perform the preſtations incumbent on him: but it is quite a different caſe, where, as in the preſent, the tocher is *de præſenti* made over to the huſband *nomine dotis;* for then the huſband becomes fiar, and the bride takes herſelf to the huſband's perſonal obligement for ſecuring her in a liferent: And this doctrine is agreeable to our law in ſimilar caſes, *e. g.* If a man make a bargain about any ſubject and deliver it, he thereby transfers the property, and has no other ſecurity for the price than the purchaſer's perſonal obligation. See *Fountainhall*, 22d *Nov.* 1692. *Hall.* 27th *Jan.* 1698, *Kennedy*.

Replied for *William Mitchel*, That the purſuer's offer to find caution for ſo much of the tocher as ſhould be made forthcoming to him, fell far ſhort of anſwering either the wife's intereſt, or that of her iſſue, ſtipulated by the contract: That the Purſuer's title was no better than Mr *Hog*'s; and, if he were inſiſting to uplift the tocher, or a part of it, ſurely it would be a good anſwer, to deſire him to implement the preſtations incumbent on him, in terms of the contract; ſeeing that was the conſideration and mutual cauſe of aſſigning the portion to him, that ſhe was not only to have the liferent of her own money ſecured to her, but likewiſe that of his, and the whole joint ſtock provided to the iſſue of the marriage; ſo that it is by no means ſufficient to offer a partial performance, in ſo far as he was enabled by her own money; ſeeing that would be to proceed as if there had been no mutual contract at all, or any proviſions made on his part. See 4th *February* 1732, Creditors of *David Watſon; Home, December* 1721, *Selkrig*; *July* 1724, *Martin.*

The Lords found, that the ſum of L. 186 *due by* William Mitchel, *being aſſigned by* Eliſabeth Mitchel, *in her contract of marriage with* James Hog, *to herſelf in liferent; that the ſaid* William Mitchel, *brother and truſtee for execution of the contract, cannot be obliged to make forthcoming to the purſuer any part of the principal ſum due by him, unleſs the purſuer ſhall find caution for the whole liferent provided to the ſaid* Eliſabeth, *in caſe of her ſurvivance.*

N° CCXLI. *July* 6. 1743.

James Ramſay of *London*, Sadler, Charger, *contra* Mr *William Hog*, Merchant in *Edinburgh*, Suſpender.

Recourſe.

ON the 6th *May* 1742, *Andrew Simpſon* drew a bill upon Meſſrs. *Skinner* and *Simpſon* Merchants in *London*, payable, 40 days after date, to the ſaid *William Hog*, value of him, which place to account, as *per* advice.

Mr *Hog* indorſed this bill to *James Ramſay*, (value of *Willi*by *Ramſay*), and, at the ſame time, wrote this memorandum at the bottom of the bill: *In caſe of need, apply to Mr* Roger Hog, *for* William Hog.

The

The bill was not paid when it became due, and upon the 19th *June*, the day after the laſt day of grace, and not ſooner, was proteſted for not payment; and then the poſſeſſor went, as directed by the memorandum, to Mr *Roger Hog*, who, obſerving that it had not been proteſted till after the laſt day of grace, believed he could not warrantably pay the ſame, and therefore refuſed payment.

Upon this *James Ramſay* brought an action of recourſe againſt Mr *William Hog*, who ſuſpended on the following grounds, 1*mo*, That the bill, though ſent to *London* ſoon after its date, was not proteſted for acceptance, though it was preſented for acceptance and the ſame refuſed, the perſons drawn on making this anſwer, That, though they had advice from *Andrew Simpſon* the drawer, that the bill was drawn on them, yet they had not at that time any effects of his in their hands; but, how ſoon the ſame ſhould come to hand, they ſhould accept or pay the bill: Upon which anſwer, it was the charger's duty to have ptoteſted for non-acceptance, which he not only omitted to do, but likewiſe omitted to give notice, by letter, to the ſuſpender, that the bill was diſhonoured, ſo as the ſuſpender might, in due time, look after his own ſecurity or relief at home, againſt *Andrew Simpſon* the drawer; nay, the charger did not ſo much as acquaint *Roger Hog*, who was at his hand.

2*do*, The charger groſsly failed in not proteſting the bill for not payment until the 19th *June*, the day after the laſt day of grace; whereas payment ought to have been demanded on the 15th; eſpecially where acceptance was not ſooner inſiſted upon: It is true, payment could not be exacted until the third day of grace, to wit, the 18th *June*.

Both which reaſons of ſuſpenſion are good, even ſuppoſing the defender could not qualify he had any loſs or damage by the neglect of ſuch notice: But, in the preſent caſe, he offers to prove, that he did not part with the value of the bill to *Andrew Simpſon* the drawer (who is now failed) until ſuch time as he had reaſon to believe the bill had been accepted, and he was ſafe.

Anſwered for the charger, That the ſuſpender was raſh in giving up the value (to wit, another bill) to *Andrew Simpſon* the drawer, on the 5th *June*, full ten days before the bill in queſtion became due; eſpecially as *Williby Ramſay*, brother to the charger, and who purchaſed the bill from the ſuſpender, lived in the ſame town with him, whereby he had daily opportunities of knowing the fate of the bill. And, with reſpect to the firſt reaſon of ſuſpenſion, it was *anſwered*, That, where a bill is drawn, as in the preſent caſe, payable at a day certain as *per* advice, there is no obligation on the porteur to preſent the ſame for acceptance before the term of payment; becauſe it is the drawer's buſineſs to notify the draught to the deſigned acceptor, without which it cannot ſafely be accepted, being drawn *per* advice; nor is it neceſſary for the porteur to preſent the bill until the term of payment, becauſe, before that term, the deſigned acceptor is neither bound to accept or pay. To the ſecond reaſon it was *anſwered*, That notification came to the ſuſpender of the diſhonour of the bill, as ſoon as he had reaſon to expect it. By the act 1681 no more is neceſſary (in order to recourſe) than that the bill be duly proteſted for non-acceptance: It is true, that the cuſtom of merchants has made a previous advertiſement neceſſary; but then a *laxamentum temporis* is allowed for giving this advertiſement, particularly in *England*, where it was negotiated, a fort-

night

night is allowed; nay, if the ſuſpender had got notice ten days before the term of payment, it would have done him no ſervice, as *Andrew Simpſon* was at that time a broken man; and the ſuſpender will not pretend to ſay, that, in that interval, he could have recovered his money. Beſides, as the laſt day of grace, to wit, the 18th *June*, was on a *Friday*, which is not a poſt-day, though the charger had proteſted it on that day, he could not have notified the proteſt to the ſuſpender ſooner than the 19th, which he accordingly did.

Replied to the firſt anſwer, That Mr *Forbes*, *chap.* 5. § 4. *p.* 64. lays it down as the practice of the trading world, that any perſon, to whom a bill is entruſted, muſt immediately, upon receiving it, demand acceptance of him on whom it is directed; and, in caſe of refuſal, proteſt for non-acceptance; and, if the general rule ſtands thus, much more muſt it hold in the preſent caſe, where the poſſeſſor has actually preſented the bill for acceptance, and the ſame is refuſed, which the charger confeſſes to be the fact: And, with regard to the excuſe, for not ſending notice, that the laſt day of grace was on a *Friday*, though it may be a good excuſe for not ſending notice, as he was not bound to ſend an expreſs, it is ſurely no excuſe for not taking the proteſt itſelf on the laſt day of grace: For, in order to intitle the portour of a bill to recourſe, two things are neceſſary, 1*mo*, That the bill be proteſted in due time. 2*do*, That intimation thereof be ſent by the firſt poſt; both which muſt be done; the intimation will not do without proteſting, nor will the proteſting without intimation. And as to what is ſaid, that the cuſtom of *England* allows a fortnight to give notice to the party liable in recourſe, the ſuſpender knows nothing of any ſuch cuſtom, in reſpect of foreign bills, which this in effect was, being drawn from *Edinburgh* upon *London*; and as the indorſer, liable in recourſe, reſided at *Edinburgh*, it was incumbent on the charger to uſe ſuch diligence as, by the law and practice of *Scotland*, is requiſite, where the defender reſides, and where the action of recourſe is now brought. See *February* 1731, *M'Kenzie*.

The Lords, in reſpect that there is no evidence brought, that the practice with regard to bills of exchange in London, *differs from the practice of this country, which is, that bills muſt be proteſted for not acceptance, on or before the day of payment; found the charger can have no recourſe againſt the ſuſpender, and therefore ſuſpended the letters* ſimpliciter.

Mr *William Adams* contra Lord *Braco*.

N° CCXLII. *Eodem die.*

Objection to witneſſes, that the one was advocate, and the other agent for the defender.

MR *Adams* architect brought a proceſs againſt Lord *Braco* for a ſuitable honorary for building a houſe to him, and for the agreed or current prices of ſuch materials as he had furniſhed. But as it was not alledged that there was any explicite agreement betwixt them, an act,

act, before anſwer, was allowed to both parties, for proving their different allegations. The defender cited Mr *Graham* of *Airth*, and *Hay* of *Montblairy*, for proving ſome accompts which were at firſt given in by the purſuer, and communings betwixt the parties, where it was ſaid none elſe were preſent.

Objected: The one was lawyer, the other agent for the defender; and, according to Lord *Stair*'s opinion, title, Probation by witneſſes, *Theſe are ſuſpect witneſſes for thoſe that truſt them, but they are not obliged to depone as to any ſecret committed to them.* See *l. ult. De teſtibus.*

Anſwered: The author does not ſay, that an advocate is an inhabile witneſs for his client; he only ſays, he is *ſuſpect*, conſequently he ſhould not be ſet aſide, though his teſtimony is not altogether unexceptionable; and where there is no penury of witneſſes, it may be a good reaſon for not examining him: And ſo far the practice of the court has gone, particularly in the reduction of the ſale of *Walſton*, where the Lords refuſed to examine *Walſton*'s lawyers touching his incapacity, becauſe there could be no penury. Nay, later practice hath much receded from the ancient ſtrictneſs in reſpect to the examining of witneſſes; that a witneſs, though exceptionable, is examined, reſerving to the judge to conſider what weight he will give his teſtimony. The defender does not plead, there are no inhabile witneſſes; but that, where the witneſs is otherwiſe credible, the objection ariſing from the ſuppoſed influence of the adducer, however it may detract from his credibility, in competition with more impartial ones, yet is no objection to his examination; and ſuch is the practice of other countries. See *Simon van Leeuwen*, in his *Cenſura forenſis, part.* 2. *lib.* 1. *cap.* 29. *n.* 21. *in fine.*

In the next place, the matters upon which they are to be examined are ſuch, to which they, and they only were witneſſes, *viz.* a communing with the purſuer where none elſe were preſent, whereby they are neceſſary; and to refuſe their teſtimony, were to refuſe the knowledge of a fact, that may be very material to the cauſe. That as in general, neceſſity ſuperſedes all rules, ſo in a particular manner, where communings are to be proved, the communers are the only witneſſes that can poſſibly be had; and as they are choſen by the parties, this, as in the caſe of inſtrumentary witneſſes, ſuperſedes all objections. Beſides, there is a ſeparate conſideration with reſpect to Mr *Graham*, which removes all exception to his examination, namely, that, at the period of the communing, there was no law-ſuit depending betwixt the parties. And with regard to the civil law, the reaſon thereof, to wit, the extraordinary connection there was betwixt the patron and client, is of no force with us, where it is to be preſumed, that their integrity will always get the better of their affection for their client. See *l.* 18. § 8. *De teſtibus.*

The Lords ſuſtained the objection.

N° CCXLIII. *July* 7. 1743.

Andrew Cochran contra The Repreſentatives of *Colonel Vanſe.*

Denunciation.

UPON the 16th December 1714, *Joſeph Vanſe* merchant in *Air*, and *Colonel Vanſe*, as cautioner, granted bond conjunctly and ſeverally, for 500 merks to *Janet Crawfurd.*

Upon the 9th of December 1721, the cautioner was charged with horning upon this bond, perſonally apprehended, and was denounced in April 1722, at the market-croſs of *Edinburgh.*

The principal debtor in the bond having become inſolvent, the purſuer, who had acquired a right thereto, brought a proceſs on the paſſive titles againſt the repreſentatives of *Colonel Vanſe*, the cautioner. And the defence pleaded was, that the cautionary obligement was at an end by lapſe of the 7 years. To obviate this, the purſuer produced the letters of horning with the charge thereupon given, both within the 7 years; and inſiſted, that, in virtue of the laſt clauſe of the Statute, this diligence preſerved entire whatever fell due within the 7 years. From which it was pleaded, that there could be no diſpute of the principal ſum after the above charge of horning; and as for annualrent, though the ſame could not be due by ſtipulation, the cautionary obligation being at an end by the lapſe of 7 years, it was nevertheleſs due in conſequence of the denunciation which followed upon the ſaid charge of horning.

Objected for the defenders: That the denunciation was at the market-croſs of *Edinburgh*, and not at the market-croſs of the ſhire where the cautioner dwelt; and therefore, could not have the effect to make the ſum bear annualrent.

Anſwered: That the denunciation at the market-croſs of *Edinburgh*, is ſufficient to all legal effects, except that of eſcheat ſingly; that in particular, it is ſufficient for a caption, which deprives a man of his natural liberty, and therefore to be conſidered as one of the greateſt pains of law; *multo magis* ought it to be ſufficient for making a ſum bear annualrent, which is not ſo much as a penalty, being only given *nomine damni* for the creditor's wanting the uſe of his money.

The Lords found, That a denunciation at the market-croſs of Edinburgh, *againſt a perſon not living at the time within that particular juriſdiction, has not the effect in law to make a ſum bear annualrent.*

N°. CCXLIV. *July* 7. 1743.

Thomas Fullarton of *Gallery*, &c. Heretors of the fiſhings on the water of *Northesk*, Purſuers, *contra Hercules Scot* of *Brotherton*, Poſſeſſor of the cruive-fiſhing on the ſaid water, Defender.

A paction betwixt private parties to diſpenſe with the Statutory regulations of cruives, is invalid, though acquieſced in for upwards of 40 *years.*

THESE purſuers brought an action againſt the defender, for keeping his cruives on the ſaid water, in every article contrary to law, not only

only with regard to the wideneſs of the hecks, neglect of the Saturday's ſlop, and of taking ſalmon in forbidden time, but alſo by raiſing the cruive-dikes to ſuch a height above the water, that the fiſh could neither get up nor down.

Pled for the defender: That the purſuers were barred, *perſonali objectione*, from inſiſting in this action, their predeceſſors or authors having entered into contracts with his authors, whereby they conſented, in conſideration of an annual payment to be made by the heretors of the cruives, to allow them to keep their cruives in the manner then and ſince accuſtomed; and, for verifying the defence, produced two different contracts, dated in the 1685 and 1687.

By which it likewiſe appeared that the purſuers authors or predeceſſors had ſpecially bound themſelves not to purſue any action againſt the defender's predeceſſor for regulating the cruives as to the wideneſs of the hecks, Saturday's ſlop, *&c.* And that the purſuers, *&c.* had ever ſince acquieſced in their agreements, and homologated the ſame by receiving the annual payments.

Anſwered: The contracts were void and null, the purpoſe of them being none other than to authorize and encourage what the law has declared to be a tranſgreſſion, and highly puniſhable, as appears from *Parl.* 1424. *cap.* ii. 1477. *cap.* 73. 1489. *cap.* 15. 1535. *cap.* 17. 1581. *cap.* iii. All which Statutes not only enact very ſevere puniſhments for this delict, but require all magiſtrates to ſee the ſame put to due execution. And the reaſon of ſo anxious an attention of the law to check ſuch delinquencies, is the ſame, *viz.* That they are not only prejudicial to the private intereſt of heretors, who have the right of ſalmon-fiſhing upon rivers; but alſo, that they are highly detrimental to the public, and plainly tend to deſtroy the very ſpecies of ſalmon, by hindering them to get up the water to ſpawn, and ſo preventing their multiplying in the ordinary way. 2*dly*, If ſuch contracts could be ſuppoſed to have any effect againſt the parties who entered into them, they ſurely could have none againſt ſingular ſucceſſors, which was the caſe of ſome of the purſuers.

Replied: Though the maxim *pactis privatorum*, &c. holds true in ſome inſtances, yet there are many more examples of the contrary, agreeable to the rule, *licet unicuique juri*, &c. but in order to give both theſe rules their full effect, it is neceſſary to diſtinguiſh betwixt ſuch regulations as the law introduced, that are truly neceſſary for preſerving the fiſhing in general, and ſuch as are no otherwiſe neceſſary than to limit the uſe of cruives in favour of ſuperior heretors. The defender acknowledges that regulations of the former ſort, cannot be renounced by paction, but ſuch as are of the latter ſort, and are only uſeful to maintain the private intereſt of the ſuperior heretors, muſt be binding.

Now, to apply this diſtinction to the caſe in hand: the defender admits, all the laws relating to the time of fiſhing are perpetual and indiſpenſible; and in fact, his cruives are always taken down in forbidden time. The old Statute with reſpect to the mid-ſtream, was found to be in deſuetude, 26th January 1665, Heretors of *Don*. Neither is the Saturday's ſlop eſſential to the ſubſiſtence of the fiſhing, as experience has proved. The acts that require 3 or 5 inches, is plainly a miſtake, as 2 inches is found ſufficient to permit the fry to go up and down the water freely. In a word, the unneceſſary wideneſs of the hecks, and

Saturday's

Saturday's ſlop, or the mid-ſtream, are quite unneceſſary for the fiſhing in general, and can have no other uſe than to reſtrain the exerciſe of the cruives, in favour, or for the private advantage, of the ſuperior heretors, which they could diſpenſe with; and which, if they were ſtrictly put in execution, would in a great meaſure deſtroy that valuable branch of our commerce.

Duplied: The regulation of cruives are *publici juris*, and cannot be diſpenſed with: the tranſgreſſion of the Statutes are declared to be crimes, and ſeverely puniſhable; conſequently, pactions diſpenſing therewith, cannot bind the conſenter, much leſs his heirs or ſingular ſucceſſors; neither can ſuch tranſgreſſion operate a preſcriptive right in favour of the tranſgreſſor.

The purſuers can diſcover no foundation for averring, that any of theſe regulations have gone into diſuſe; on the contrary the legiſlature, while we continued a ſeparate kingdom, injoined the vigorous execution thereof from time to time, neither has any of our lawyers inſinuate that they could go into diſuſe. See Statute of *Robert* I. *cap.* 12. *act.* 74. *James* III. *act.* 68. *Parl.* 9. Q. *Mary act.* 8. *Parl.* 1617. *art.* 9. *act.* 38. *Parl.* 1661. and a caſe in the 1737, between the Duke of *Gordon* and Lord *Braco*.

The Lords repelled the defence founded on the contracts produced, and ſuſtained the purſuers title to inſiſt in this action.

N° CCXLV. *July* 12. 1743.

David, &c. *Lindſays* contra *Helen Hunter*.

The objection to witneſſes, that the one is lawyer and the other agent for the adducer, is good, though the occaſion of their knowledge of the facts they were to be examined upon, preceeded the period of their being employed.

IN the reduction, betwixt theſe parties, of *James Man*'s ſettlement, it was averred by the purſuers, that the teſtator gave no directions to the writer to make out the teſtament, but that the ſame were given by the defender, in whoſe favours the ſame was made; and both parties being allowed, in common form, a proof of all facts and circumſtances relative thereto, the defender cited Mr *James Graham* advocate, *James Ramſay* writer to the Signet, and *Henry Cowie* his clerk, as witneſſes for her.

Objected: That the firſt was lawyer, and the other the ordinary doers for the defender.

Anſwered: Whatever force there may be in the objection in general, eſpecially where there is a *copia teſtium aliorum*, yet in this caſe they were *teſtes neceſſarii*, as the firſt directed and adviſed the ſettlement, and the laſt wrote it; therefore they muſt be conſidered in the ſame light as if they had been inſtrumentary witneſſes, in which caſe there could be no doubt, that they would have been habile witneſſes. And wherever lawyers or doers, from the nature of the fact admitted to proof, become

teſtes

teſtes neceſſari, and the only perſons who can give evidence thereof, which they have not learned during the dependence of the ſuit, or from their client, there the objection has always been repelled.

Replied: That, in ſome caſes, witneſſes, who are in general exceptionable, are admitted, when the circumſtances of the caſe ſpeak out that they are neceſſary, and when, at the ſame time, the objection to them does not ariſe from the fact and deed of the adducer: *E. g.* domeſticks, in caſes of ocult crimes, tutors and curators, and near relations to the adducers, as to tranſactions which they alone can explain, as it would be hard to deprive any perſon of a piece of evidence, which appeared from the nature of the thing abſolutely neceſſary, and this without any fault of the adducer; and therefore, if the purſuers laid their objection upon that head allenarly, that the witneſſes had been her ordinary doers in all her affairs, the ſame could not be good. But the preſent caſe is quite different; for not only were theſe witneſſes the defender's ordinary doers, at the time ſhe got the ſettlement made, but, when it came to be challenged, ſhe employed them to manage the defence, and accordingly, they have been appearing for her from the beginning. It is upon this laſt employment the purſuers lay their objection; which ariſes from no neceſſity of the caſe, but entirely from the defender's own fact and deed: She had it in her power to adduce them as witneſſes; but as ſhe inclined to take their aſſiſtance in managing her law-ſuit, ſhe thereby paſſed from any aid they could give her in another capacity.

The Lords ſuſtained the objection as to Meſſ. Graham *and* Ramſay; *but found that* Henry Cowie *ſhould be admitted, ſince he was writer of the deed.*

No CCXLVI. *July* 21. 1743.

George Dempſter Merchant in *Dundee*, Purſuer, contra *James Ferguſon* of *Kinmundy*, Defender.

Inability in tenants to deliver victual, on account of a general ſcarcity, is no defence to the maſter, who has obliged himſelf to deliver a certain quantity yearly.

ANNO 1732, Theſe parties entered into a contract, whereby the defender obliged him to deliver to the purſuer, at *Peterhead*, yearly, 350 bolls farm-meal, the growth of the defender's lands, ſpecified in the contract, and that for a certain period; and to pay one merk Scots for each undelivered boll, and that, by and at our performance; as, on the other hand, the defender obliged himſelf to pay L. 4, 10 s. Scots for each delivered boll; and each party bound themſelves to performance, under the penalty of L. 100 ſterling.

Both mutually performed their ſtipulation to each other, till the year 1739, when *Kinmundy* fell ſhort 53 bolls of the quantity he ought to have delivered for that year, and likewiſe of the whole quantity he ought to have delivered for crop 1740; for which the purſuer brought an action againſt him for damages, concluding for the ſum of , being the difference

difference betwixt the price ſtipulated by the contract, and the current price of meal in the country at the time.

In defence it was argued that, there was ſo great a ſterrility theſe years, particularly the laſt of them, that the tenants were not able to deliver their victual conform to tack; in which caſe the law liberates them, tho' no proviſion is made with reſpect thereto in the tack: In the ſame manner, as the caſe of an extraordinary ſcarcity is not provided for in this contract, the law muſt conſider what the *præſumpta voluntas* of the parties was with regard to ſuch event. To illuſtrate this, let us ſuppoſe, one buys the cargo of a ſhip coming from the *Eaſt* or *Weſt-Indies*; ſure if the ſhips ſunk at ſea, the ſeller will not be liable in damages. It merits likewiſe to be conſidered, that an heretor of lands entering into ſuch a contract as the one in queſtion, is not dealing like a merchant who is to purchaſe, where he can have it, a commodity he wants to ſell, but what he diſpoſes of allenarly are the farms paid him by the tenants: it depends upon them how far he is able to perform it, and not upon himſelf, and what he is able to make them pay, ſo far he is to deliver; but if there was war, peſtilence, famine, *&c.* as the ſeller behoved to loſe himſelf, the buyer was not to grudge the loſs of the profit he would have made upon the calamities of the country. The fair conſtruction therefore of the contract is, that the ſubject of ſale in view of the parties, was the rents of the particular lands; and if, by a general diſaſter, the tenants were unable to pay their maſter, it could never be intended that he ſhould be obliged to deliver what he could not receive himſelf. No law ſure could have compelled him to do an act of barbarity, and lay his lands waſte, by diſtreſſing, or ſtarving his tenants. In a word, as to what victual was delivered, he is willing to accompt for the prices he received; and as to what was not delivered, the damages cannot go higher, at any rate, than a merk for each undelivered boll, the penalty for not delivery being liquidated to that ſum by the contract itſelf: For as to the laſt penalty of L. 100 ſterling, that, if the contract has any meaning at all, muſt refer to expences.

Anſwered: That, in conſidering the import of the contract, it was neceſſary to have in view the purſuer's ſituation, who is a merchant dealing in victual, who no doubt comes under many ſtipulations to others, both at home and abroad, to furniſh them with victual; and if thoſe that are bound to him ſhall be encouraged, or allowed to fail in the exact delivery, either when they can diſpoſe of it at higher rates than thoſe contracted for, or when they have a mind to do a piece of favour to their tenants, the certain conſequence muſt be, the abſolute undoing of the purſuer in the way of trade. The words of the contract itſelf are clear, without providing, that the delivery ſhould be diſpenſed with upon any contingency: on the contrary, if the delivery was not made in due time, the defender is bound to pay a merk for each boll undelivered, and that by and at our performance. As to the plea, that the tenants were not able to perform their part, the purſuer contends he is not bound to inveigle himſelf in ſuch queſtions, either of how much they paid, or were able to pay; his buſineſs is with the defender alone; if he cannot pay the number of bolls ſtipulated in *ſpecie*, the rule of law muſt take place *loco facti impræſtabilis, &c.* The purſuer ſtipulated for a certain quantity of meal yearly, the growth of certain lands, which he knew produced good meal; and if the defender either will not, or cannot perform, he ought to make up to the purſuer what he thus ſuffers by not performance.

Nor

Nor will the principles of the civil law aid the defender, which frees the seller if the thing sold is lost or destroyed before delivery; because, in this case, he was bound to deliver the meal at *Peterhead*, and only after such delivery was the pursuer to run any hazard; *si venditor ad traditionem tenetur* is always deemed an exception from the general rule. Besides, the plea offered for the defender can never avail him; he gives his tenants what cases he thinks fit; what he gets he sells at such prices as he thinks proper, leaving it to the pursuer to make out the prices the best way he can; sure this is not fulfilling the contract.

The Lords found the defender liable to the pursuer for the current prices of what meal he received from the tenants.

No CCXLVII. *July* 21. 1743.

Mary M'Quhirter, contra *Robert Millar*.

Children attaining possession of their mother's third of moveables, need not confirm the same, in order to barr those, who, upon their death, shall become nearest of kin to the defunct wife.

IN the contract of marriage betwixt the said *Robert Millar*, and *Elizabeth M'Quhirter*, he provided her to a tack of certain lands, that he possessed during her widowity. " And further obliged himself to provide " her a livelihood of 1000 merks during all the days of her lifetime, and " to the heirs to be gotten betwixt them; which failing, the one half of " the said sum of 1000 merks, to return to the said *Robert*, and his heirs " whatsoever; but prejudice to *Elizabeth* and her foresaids, either to ac- " cept of the 1000 merks, or that portion of free goods that may fall to " her by law (if it shall please God first to call him) being at her option, " or her foresaids, whilk of them to take or leave."

The marriage dissolved by the wife's death, leaving issue but one son, who lived in family with his father, and, like other eldest sons of their rank, was assistant to him in the management of his farm. The son died without being confirmed executor to his mother, or establishing in his person any title to the third of moveables his mother was entitled to by law; whereupon, *Mary M'Quhirter*, as nearest of kin to *Elizabeth* her sister, brought an action against *Robert Millar*, to accompt to her for his wife's third of moveables.

Argued for the pursuer, that it was evident from the contract of marriage, that none of the provisions therein contained were intended to be in satisfaction to the wife, or her nearest of kin, of the third of moveables, which she was entitled to in the event of her predeceasing her husband: on the contrary, the only provision is her liferent, in case she survived him; therefore the present claim stands unimpeached from any clause in the contract. 2*dly*, The wife's third befalling to her nearest of kin, is a right of succession to that which was the proper estate of the wife, and that it does not vest in them *ipso jure*, but proper titles must be made up, by confirming the same *qua* executor to the wife; without which, they remain *in hereditate jacente* of the wife; consequently, it is of no moment in the present case, that there was a son of the marriage, who as nearest

of

of kin to his mother, might have eſtabliſhed proper titles thereto. This he neglected to do, and, by his death, the purſuer became neareſt of kin to her ſiſter. In ſuch caſes, it matters not who is neareſt of kin at the wife's death, but to whom the right belongs when the titles come to be made up. See 17th *February* 1663, *Forſyth*.

Anſwered for the defender, That the preſent claim as it is of the moſt odious kind, ſo it is excluded by the contract of marriage, which, after providing *Elizabeth* to the liferent of a tack during her widowity, provides her to the liferent of 1000 merks; and which ſum, is the only proviſion to the children of the marriage, without prejudice to the wife, either to accept thereof, or the portion of free goods that would fall to her by law. Now the wife's neareſt of kin was *Peter*, her own ſon; and that ſum being payable to the children of the marriage, muſt be underſtood, in ſatisfaction to them, of their mother's third, which they, in caſe of her predeceaſe, were to bruik free of her liferent; and his ſurviving his mother, intitled him thereto, without any confirmation; conſequently that ſum fell under *Peter* the ſon's teſtament, who made a will in favours of his father the defender, and which would belong to him as neareſt of kin to his ſon without ſuch teſtament.

But, in the next place, admitting the wife's neareſt of kin were not cut out of this claim by the contract, yet it is believed the ſame cannot be effectual at this day. The wife was fifteen years dead before this claim was brought; all that time the defender alimented his ſon till his majority, the effects were managed in common, the defender being his ſon's adminiſtrator in law, which aliment muſt have more than exhauſted the third of moveables. Further, when the ſon came to be of age, he gave him a third of all the ſtocking he had upon the ground, which was altogether a free gift in him, as the aliment furniſhed to the ſon more than exhauſted any claim to the third.

For it appears, from the proof adduced in this cauſe (while it depended before the inferior court) that the defender and his ſon poſſeſſed the farm together, and that the ſon was as much maſter of the one third as the defender was of the other two. Nay, one of the two witneſſes adduced, ſays, what is very remarkable, that he bought at one time one cow from the ſon, and two from the father. In ſhort, the defence reſolves in this, that the ſon poſſeſſed his mother's third, was ſatisfied therewith, and the ſame being conſumed, and the property altered, all the wife's ſucceeding neareſt of kin muſt be equally excluded, as if he had been confirmed executor to his mother; a confirmation is only requiſite to make up a title of property in the ſubjects, and if the property is otherways made up, the claim is extinguiſhed. See the act 1690.

Replied: The arguments for the defender would not hold; for he was in poſſeſſion of the goods, and whole moveable effects during the marriage *jure mariti*; he was debitor to his wife's neareſt of kin for her third ſhare, or the values thereof; he continued to poſſeſs as formerly after the wife's death, without making any diviſion with her neareſt of kin; and becauſe it happens that he was adminiſtrator-in-law to his ſon, he will conſtrue his own poſſeſſion, to have been the ſon's poſſeſſion, and will thereby have the preſent claim defeated, when he is not able to ſhow that any diviſion was made, that he accompted for, or paid over the values, or obtained any acquittance from the ſon for the third. It is unneceſſary therefore, to enter into that point of law, how far poſſeſſion attained is

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ſufficient to avoid the claim of any after neareſt of kin, as no diviſion appears ever to have been made; and as to the teſtimonies of the two witneſſes, they amount to no more than what every body would have believed without them, *viz.* That the ſon lived in family with his father, and was aſſiſtant to him in the management of the farm; and it is very whimſical to infer a diviſion from the accidental circumſtance of one of the witneſſes buying one cow from the ſon, and two from the father, eſpecially as he does not ſay, that the cow bought from the ſon was any part of the father's ſtock. Beſides, it is well known the defender was poſſeſt of other moveables of different kinds, money, houſhold-pleniſhing, debts, *&c.* and it is not pretended there was ever any diviſion of theſe.

The Lords found, that the children of a marriage attaining poſſeſſion of their mother's third of moveables in communion, need not confirm theſe moveables, in order to bar thoſe who, upon the death of theſe children, ſhall become neareſt of kin to the ſaid defunct wife, from claiming the ſaid moveables; and found ſufficient evidence to preſume in this caſe, that the defender's ſon did attain poſſeſſion of his mother's ſhare of moveables.

N° CCXLVIII. *July* 24. 1743.

Major *Robertſon* contra *John Robertſon.*

Fruit Trees.

IN the queſtion betwixt theſe parties, the Lords found, That fruit trees fell under the Acts of Parliament, for preſervation of planting.

N° CCXLIX. *July*, 1743.

Executors *qua* neareſt of Kin to *Dougal Campbell*, contra *Alexander Campbell* of *Shirvane.*

Whether the rents of an eſtate unuplifted belong to the executors of an apparent heir, who had likewiſe a perſonal right to the land, or to the next ſubſtitute in the ſettlement who ſucceeded thereto, after the apparent heir's deceaſe.

ANNO 1728, *Dougal Campbell* of *Shirvane*, by his bond of tailzie, obliged himſelf to reſign his eſtate in favour of *Archibald Campbell*, in liferent, and to *Dougal* the eldeſt ſon of *Archibald*, *&c.* which failing, to *Alexander Campbell.*

Anno 1737, by another bond of tailzie, the ſaid *Archibald* obliged himſelf to reſign the eſtate to himſelf in liferent, and to *Dougal* his ſon, *&c.* which failing, to the ſaid *Alexander Campbell.*

After the death of *Dougal Campbell* elder, and *Archibald* his ſon, the eſtate devolved on *Dougal*, the ſon of *Archibald*, who dying likewiſe in

of kin to his mother, might have eſtabliſhed proper titles thereto. This he neglected to do, and, by his death, the purſuer became neareſt of kin to her ſiſter. In ſuch caſes, it matters not who is neareſt of kin at the wife's death, but to whom the right belongs when the titles come to be made up. See 17th *February* 1663, *Forſyth*.

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But, in the next place, admitting the wife's neareſt of kin were not cut out of this claim by the contract, yet it is believed the ſame cannot be effectual at this day. The wife was fifteen years dead before this claim was brought; all that time the defender alimented his ſon till his majority, the effects were managed in common, the defender being his ſon's adminiſtrator in law, which aliment muſt have more than exhauſted the third of moveables. Further, when the ſon came to be of age, he gave him a third of all the ſtocking he had upon the ground, which was altogether a free gift in him, as the aliment furniſhed to the ſon more than exhauſted any claim to the third.

For it appears, from the proof adduced in this cauſe (while it depended before the inferior court) that the defender and his ſon poſſeſſed the farm together, and that the ſon was as much maſter of the one third as the defender was of the other two. Nay, one of the two witneſſes adduced, ſays, what is very remarkable, that he bought at one time one cow from the ſon, and two from the father. In ſhort, the defence reſolves in this, that the ſon poſſeſſed his mother's third, was ſatisfied therewith, and the ſame being conſumed, and the property altered, all the wife's ſucceeding neareſt of kin muſt be equally excluded, as if he had been confirmed executor to his mother; a confirmation is only requiſite to make up a title of property in the ſubjects, and if the property is otherways made up, the claim is extinguiſhed. See the act 1690.

Replied: The arguments for the defender would not hold; for he was in poſſeſſion of the goods, and whole moveable effects during the marriage *jure mariti*; he was debitor to his wife's neareſt of kin for her third ſhare, or the values thereof; he continued to poſſeſs as formerly after the wife's death, without making any diviſion with her neareſt of kin; and becauſe it happens that he was adminiſtrator-in-law to his ſon, he will conſtrue his own poſſeſſion, to have been the ſon's poſſeſſion, and will thereby have the preſent claim defeated, when he is not able to ſhow that any diviſion was made, that he accompted for, or paid over the values, or obtained any acquittance from the ſon for the third. It is unneceſſary therefore, to enter into that point of law, how far poſſeſſion attained is

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The Lords found, that the children of a marriage attaining poſſeſſion of their mother's third of moveables in communion, need not confirm theſe moveables, in order to bar thoſe who, upon the death of theſe children, ſhall become neareſt of kin to the ſaid defunct wife, from claiming the ſaid moveables; and found ſufficient evidence to preſume in this caſe, that the defender's ſon did attain poſſeſſion of his mother's ſhare of moveables.

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IN the queſtion betwixt theſe parties, the Lords found, That fruit trees fell under the Acts of Parliament, for preſervation of planting.

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Executors *qua* neareſt of Kin to *Dougal Campbell*, contra *Alexander Campbell* of *Shirvane.*

Whether the rents of an eſtate unuplifted belong to the executors of an apparent heir, who had likewiſe a perſonal right to the land, or to the next ſubſtitute in the ſettlement who ſucceeded thereto, after the apparent heir's deceaſe.

ANNO 1728, *Dougal Campbell* of *Shirvane*, by his bond of tailzie, obliged himſelf to reſign his eſtate in favour of *Archibald Campbell*, in liferent, and to *Dougal* the eldeſt ſon of *Archibald*, *&c.* which failing, to *Alexander Campbell.*

Anno 1737, by another bond of tailzie, the ſaid *Archibald* obliged himſelf to reſign the eſtate to himſelf in liferent, and to *Dougal* his ſon, *&c.* which failing, to the ſaid *Alexander Campbell.*

After the death of *Dougal Campbell* elder, and *Archibald* his ſon, the eſtate devolved on *Dougal*, the ſon of *Archibald*, who dying likewiſe in

February 1737, the ſame devolved on the ſaid *Alexander Campbell*, againſt whom the ſiſters of *Dougal Campbell* younger, as executors *qua* neareſt of kin to him, brought an action for payment of the half of the year's rent cropt 1737, which he had intromitted with, as being *in bonis* of their brother, and ſo falling under his executry.

The defence offered for *Alexander Campbell* was, That *Dougal* younger, having died an infant, without making up any titles in his perſon to the eſtate, the ſame was never veſted in his perſon; and that, however his apparency, or the perſonal right that was in him, might have been a lawful title of poſſeſſion, had he actually apprehended the ſame, and uplifted the rents; yet, as in fact, he uplifted none, the rents were *in medio* at his death, and of courſe belonged to the defender, the next ſubſtitute, who came immediately to have the ſame title of *interim* poſſeſſion that *Dougal* younger might have uſed; and who, upon compleating his title, and executing the procuratory of reſignation, will become the immediate ſucceſſor to the perſon laſt infeft, and granter of that procuratory.

In a word, the principle on which the defence is founded, is, that the imperfect right of an apparent heir can go no further, than to make theſe rents become his, which he had actually uplifted; and that he was by no means to be conſidered as in the ſame ſtate with a perſon veſted in the fee, whoſe executors are no doubt intitled to take the rents that were due and payable, at, or before the legal term immediately preceeding his death.

And if the law ſo ſtand with reſpect to *Dougal Campbell* younger, his title to theſe rents as apparent heir of the former inveſtiture, the defender is adviſed that his other title is no better, or more compleat, which conſiſts of the perſonal rights above recited, by the procuratories of reſignation in *Dougal*'s favours made by his father and grandfather, with deſign to veſt the fee in him by way of purchaſe or conveyance: For ſtill it is true, that the feudal right to the lands remained with the perſon laſt infeft in the lands, granter of ſuch procuratory; and that the eſtate and rents thereof, ariſing after his death, are ſtill as *fructus pendentes in hæreditate jacente* of him who was laſt infeft in the lands, and will therefore be carried by the defender, whenever he, by executing the procuratory, ſhall connect his title by infeftment with the laſt vaſſal who ſo died infeft, and who granted this procuratory to himſelf in liferent, and to *Dougal*, and the heirs ſubſtitute to him, in fee. See 29th *February* 1668, *Roſs*; 7th *July* 1681, *MacBrair*; 20th *November* 1663, *MacBrair*; collected by *Fountainhall*; and *February* 1688, *Balgony*; *February* 1633, *Oliphant*.

The Lords found, that the purſuers have right to the half of the year's rent libelled, and preferred them, &c. *They always confirming before payment.*

N. B. It is ſaid this judgment was founded on this, that *Dougal Campbell* was fiar of the eſtate.

N° CCL. *November* 22. 1743.

Competition *Robert Anderſon*, ſon to Bailie *Anderſon* by his firſt Marriage, with *Patrick*, &c. *Anderſon*'s Children of the ſecond Marriage.

Diſcharge granted by a ſon to his father, of portion natural, and of all the ſon could ask or claim, thro' his father's deceaſe, upon whatever cauſe or occaſion, does not cut off the ſon's right of ſucceſſion to his ſhare of the dead's part.

THE deceaſed Bailie *Anderſon* intermarried with *Jean Haxton*, with whom he got 5000 merks, beſides ſeveral other ſums, which *Jean Harvie*, her mother, gave him from time to time. She likewiſe diſponed ſeveral heretable ſubjects to *Robert*, *Jean*, and *Agnes Anderſons*, procreate of this marriage, her grandchildren.

Jean Haxton died; whereupon the Bailie married *Iſabel Anderſon*, and, in the poſtnuptial contract with her, he bound himſelf to add 6000 merks of his own to 6000 he received with his wife; and further provided the conqueſt, to "the children of that marriage, of all lands, tenements, "annualrents, debts, ſums of money, which he ſhould happen to con- "queſt, and acquire, during the exiſtence of the ſaid marriage."

The Bailie managed the effects left to his children of the firſt marriage, and obtained a diſcharge from *Robert*, and *Agnes*, (*Jean* being then dead) not only of his intromiſſions, but likewiſe of their bairns part of gear. Before his death he made ſeveral ſettlements in favours of his children of the ſecond marriage; ſo that a ſmall part of his moveables (ſuch as corn, wine, *&c.*) remained after his death, that fell under the dead's part, and was not comprehended under the clauſe of conqueſt in the ſecond contract of marriage.

Robert and *Agnes* applied to be confirmed executors *qua* neareſt of kin to their father, in order to take up theſe ſubjects; but before the proceſſes were determined, *Agnes* died, who had likewiſe granted her father a diſcharge; but, which is unneceſſary to reſume, as ſhe was not in the competition.

The children of the ſecond marriage appeared, and pled, That *Robert* was cut out of any claim he could have to his father's effects, by the tenor of the diſcharge he had granted to him, which proceeded on the narrative, that the Bailie had advanced ſums of money to him in full of all intromiſſions he had had with *Robert*'s effects; as alſo, "In full of his bairns part of "gear, or any other claim or demand he might have againſt his fa- "ther, by and thro' his deceaſe, or for any other cauſe or occaſion whatever." And then it proceeds to diſcharge the Bailie, his heirs, executors, and ſucceſſors, of his intromiſſions, and alſo of his bairns part of gear, and of all he (*Robert*) could aſk, claim, crave, exact, or demand of, or from him, and his foreſaids, by and thro' his deceaſe, or for any other cauſe or occaſion whatever; and concludes with this declaration, "That the generality of the ſaid diſcharge ſhould be as valid and ef- "fectual to all intents and purpoſes, as if every particular had been "mentioned and inſerted therein; whereanent he (*Robert*) diſpenſes "for ever."

Anſwered

Anſwered for *Robert*: That it was obvious from the diſcharge, that the only two claims the parties had in view, of which they treated, was, 1*mo*, To diſcharge Bailie *Anderſon* of his intromiſſions with his ſon's effects. 2*do*, To diſcharge the Bailie of all claim his ſon had to a *legittim* after his death, and which *Robert* could not be diſappointed of without his own conſent; ſo that there was nothing in the deed to lead one to think that *Robert* was excluded from the dead's part, or that this ſucceſſion was at all under the view of parties at the time of this tranſaction. That, in no ſenſe could it be ſaid, that this ſucceſſion was what the ſon could aſk, claim, or crave, or that it could be the foundation of any proceſs, action, *&c.* at the ſon's inſtance againſt his father, ſince it depended intirely in the father's power to diſpoſe thereof at pleaſure. That the dead's part was not a claim competent to a ſon againſt his father's repreſentatives; for if the father ſettle his ſucceſſion, and name to himſelf heirs *in mobilibus a teſtato*, the ſon has no claim againſt theſe heirs for any ſhare of the dead's part. And if the father do not, but leaves it to fall *ab inteſtato*, the ſon's ſhare in that ſucceſſion is not a claim which he has to exact of his father's repreſentatives, but he is, in that caſe himſelf one of his ſucceſſors *in mobilibus*, and is intitled in his own right to continue or recover the poſſeſſion of his father's effects. As this ſucceſſion does not come under the words of the diſcharge, ſo it cannot be ſuppoſed to come under the intention of parties. For what occaſion had the father to aſk a diſcharge from his ſon, of a ſucceſſion which he could never take but from the father's own free will? It is proper for a debtor to take a diſcharge from his creditor, or where the perſon who takes it lies under reſtraints, which the granter of the diſcharge only can releaſe him from, as in the caſe of legittim. But that a father ſhould take a diſcharge for what was in his own power to diſpoſe of by two lines, would be very idle, and ought not to be preſumed; more eſpecially, as the Bailie made ſeveral ſettlements in favours of the children of the ſecond marriage, and yet execute no teſtament, which he would not have omitted, if he had intended to exclude the children of the firſt marriage from the ſucceſſion of the dead's part. That it was a rule of interpreting general clauſes of deeds ſuch as this, That wherever it appeared, that there were particular claims under the view of parties, which gave riſe to the diſcharge, to interpret no general words ſo as to comprehend other claims. And even where the general words, in ſtrict propriety, are ſufficient to include it, yet, where it is apparent that ſuch claim did not come under the view of parties, even the propriety of the words, in that caſe, will not be ſufficient to comprehend it. See 27th *January* 1670, *Innes*; 27th *July* 1671, *Baillie*; and a late caſe betwixt *Andrew Pringle*, and *Aliſon Pringle* his ſiſter.

Replied: That it was plain from the two diſcharges granted by *Agnes* and *Robert*, that the father intended to free his executor from any claim or demand that might be made by the children of the firſt marriage; and that it was a very common method for fathers to ſettle their executry, or ſecure it to certain children, to take diſcharges, or renunciations from ſuch of them as were *foris familiate*. That here it was admitted, the father was tranſacting for the bairns part, or portion natural, whereby he was plainly clearing his ſucceſſion from an incumbrance upon it, in favours of other executors; and when he was doing this, it was natural for him, at the ſame time, to bar the other demand that would

would ariſe upon the executry, in caſe, either by neglect, or unforeſeen accidents, he ſhould die without making a teſtament. And in order to do this, it was not neceſſary that the narrative of the diſcharge ſhould bear, that the tranſaction was upon that particular account; in regard, an onerous cauſe was not neceſſary. It being ſufficient, that the diſcharging words clearly and plainly comprehend it. Nor is the obſervation, That the ſucceſſion to the dead's part, is not a claim on the father, of any force; for neither is the portion natural a demand upon the father, but it is not dubious, that the ſucceſſion to the dead's part is a demand upon the other executors, and a claim againſt them, who may confirm the whole. And the diſcharge here, is not only of the portion natural, but of all claim and demand of, or from Bailie *Anderſon*, or his executors, by and through his deceaſe, or for any other cauſe or occaſion whatſoever. Words which clearly cut off the ſon's right of ſucceſſion, *ab inteſtato*, and ſhow that the intention was to redd marches betwixt the children of the different marriages, ſtill reſerving power to the father, in ſo far as not tied up by contract of marriage, to have given part of his executry, by teſtament, even to thoſe who renounced.

The Lords found, that the diſcharge granted by Robert Anderſon, *does not comprehend his right of ſucceſſion to his ſhare of the dead's part.*

N° CCLI. *November* 26. 1743.

Mr *Garden* of *Troup* contra Mr *Thomas Rigg* of *Morton*, Advocate.

A lawyer and truſtee cannot object to the form of a bill, granted by him to the perſon who truſted him.

AMONGST the various queſtions which occurred betwixt theſe parties, the defender objected to two bills granted by him to Mr *Arrot*, that the ſame bore annualrent from the date, and penalty, conſequently were null, conform to a late deciſion.

Anſwered: That it deſerved to be conſidered, whether the rule lately laid down ought to be followed with reſpect to bills granted long before the date of that deciſion, and at a time when it was vulgarly believed that ſuch addition did not vitiate bills.

2*do*, In this particular caſe a peculiar anſwer occurred, ariſing from the circumſtances of the parties, which behoved to remove the objection, *viz.* That the defender, at the time of granting the bills in queſtion, was Mr *Arrot*'s friend and lawyer, ſo could not object to his own deed, for theſe bills behoved to be conſidered to be the defender's deeds, as much as Mr *Arrot*'s, who was no lawyer, and truſted the defender that he would not give him an informal ſecurity for his money.

The Lords found, That the defender being, at the date of theſe bills, ordinary lawyer and truſtee to Mr Arrot, *was thereby debarred from objecting againſt the form of the bills.*

N° CCLII. *December* 20. 1743.

Lord *Maxwell* contra *William Tait*.

Tailzie not recorded, what effect it has with reſpect to diſabling heirs to ſell.

THE Earl of *Nithſdale* having tailzied his eſtate, diſponed the ſame to Lord *Maxwell*, who, having ſold part thereof by a minute of ſale to the ſaid *William Tait*, charged him to implement the ſame; and, in ſupport of the charge, pled, That the diſpoſition in favours of the charger, having never been recorded in the regiſter of tailzies, was not good, by the act 1685, againſt third parties, it being there ordained, that ſuch tailzies ſhould only be allowed, which are recorded in the manner therein preſcribed. *2do*, That altho' the tailzie be the deed by which the charger holds the lands, and ſo muſt make part of the progreſs given to the ſuſpender, who, on that account, cannot plead ignorance, in caſe his title were quarrelled by any ſucceeding heir; yet this can afford no objection, in reſpect the ſame is clothed with infeftment long ago.

Anſwered: That entails were valid before the act 1685, and, when regularly guarded by prohibitive and irritant clauſes, did bar all alienations.

An attempt to ſell, or contract debt, was a forfeiture, after which the right granted was truly *a non habente poteſtatem*. That it was not the intendment of the ſtatute to alter the law, but to give new force to it, with reſpect to ſuch entails as ſhould be made thereafter. That the entail in queſtion was made preceeding the act, and the minute of ſale charged on was a forfeiture of Lord *Maxwell*'s right, conſequently the ſuſpender cannot be bound to pay the price, when any right flowing from the charger would be *a non habente*. As for the clauſe in the ſtatute, *That tailzies ſhall only be allowed, which are recorded*; the meaning is, that tailzies not recorded ſhall have no countenance, or ſupport from the act; did it mean, that all tailzies were to be cut down that were not recorded, it would neceſſarily follow, that they would not be good againſt heirs, nor creditors. *2do*, Taking the ſtatute to reſpect creditors only, leaving entails not recorded to affect heirs, which is commonly underſtood to be the meaning of it, yet ſtill, upon that footing, the ſuſpender is not ſafe, as he cannot plead a *bona fides*, being now in a proceſs about this very entail; and if the perſon who contracts with the heir of entail, acknowledges he was intimately acquainted with the deed of entail, there is no pretext for his having the benefit of the ſtatute.

Replied: If an entail not recorded be not good againſt creditors, neither ought it to be effectual againſt a purchaſer; and if a creditor could carry it off by adjudication, ſo may a purchaſer who is truly creditor to the ſeller; more eſpecially ought this to hold in this caſe, where there is no prohibition on the charger to ſuffer adjudications to be led. And as to the ſuſpender's private knowledge, putting him in *mala fide* to accept of a diſpoſition from the charger, it was anſwered, That if, by the public law, a tailzie not recorded is not good againſt third parties, private knowledge will not hurt; if a writing is execute, but not ſo as the law directs,

directs, no body is bound to pay any regard to it, but are in full ſafety to act as if no ſuch thing were.

The Lords ſuſpended the letters on this ground, that the caſe was doubtful, and that the proper contradictors were not in the field; and therefore, that the ſuſpender could not be bound to accept of the bargain.

N° CCLIII. *December* 21. 1743.

Margaret M'Kenzie contra *Janet Buchanan.*

1. *Objection to a ſaſine, that it was not conform to the warrant or precept.* 2. *If duly recorded by the proper officer.*

WILLIAM Buchanan of *Sound, anno* 1697, granted an heretable bond for *L.* 1900 *Scots*, on his eſtate, on which ſaſine followed on the precept. In an action of poinding the ground, at the inſtance of an aſſignee, it was objected by an adjudger in poſſeſſion, that the ſaſine was void, as diſconform to the precept, which runs in the following terms:

" Attour to my lovits, I will, and require you, that ye paſs, and de-
" liver heretable ſtate and ſaſine, actual, real, and corporal poſſeſſion of
" the ſaid annualrent of *L.* 114 yearly, to be uplifted furth of, *&c.* to
" *&c.* by a deliverance of a penny money, in name of the ſaid annual-
" rent, and earth and ſtone of the ground of the ſaid lands, as uſe is; re-
" deemable always, *&c.*"

The bailie execute the precept of ſaſine thus, " Gave and delivered
" heretable ſtate and ſaſine, actual, real, and corporal poſſeſſion, of
" all and haill the lands of, *&c.* to *&c.* by deliverance of earth and
" ſtone of the ground of the ſaid lands, and an penny money, in name
" of the ſaid annualrent, as uſe is, after the form and tenor of the here-
" table bond, and precept of ſaſine, in all points."

The objection, therefore, to the purſuer's ſaſine, was, that the precept was a warrant to give ſaſine of one thing, *viz.* a certain annualrent to be uplifted furth of the ſaid lands; and ſaſine is actually given of another thing, *viz.* of the lands themſelves, and is therefore void and inept, conſequently cannot maintain this action of poinding the ground; nor does it remove the objection, that the ſaſine bears the proper ſymbols to have been delivered, that were fit and ſuitable for giving an infeftment of annualrent, in theſe words, " By deliverance of earth and
" ſtone of the ground of the ſaid lands, and a penny money in name of
" the ſaid annualrent, as uſe is, after the form and tenor of the ſaid he-
" retable bond, *&c.* in all points." For the queſtion is, What was it the bailie gave, and delivered by means of theſe ſymbols? The anſwer to which is plain from the principal words of the inſtrument of ſaſine, which recite the *res geſta* to have been, that the bailie gave and delivered heretable ſtate and ſaſine, of all and haill the lands of , and haill parts, pendicles, *&c.* thereof: So that he erred in the ſubſtance, by delivering the thing that he was not authorized to deliver, and neglecting to deliver the thing he was authorized to deliver. The delivery of the ſaſine is a ſolemnity that muſt be ſpecifically performed, and muſt

muſt be taken to have been celebrated as in the inſtrument itſelf is ſet furth; and as that is plainly diſconform to its warrant, it cannot mend the matter. What is afterwards ſet furth, *viz.* "That the ſame was "done after the form and tenor of the precept of ſaſine."

2do, It was objected, that the ſaſine was not regiſtered, conform to the act 16. 1617, in ſo far as it bore to be marked on the back to be regiſtrated in the regiſter, appointed for that effect in the country of *Orkney*. "By me *Thomas Brown* notary public, in abſence of *Thomas Stewart* notary public, clerk-ſubſtitute, and keeper thereof, *&c.*" which was pled to be no regiſtration, in ſo far as it did not appear that *Thomas Brown* had any ſubſtitution from *Thomas Stewart* clerk-ſubſtitute, to officiate for him in his abſence, or that *Stewart* had any power to ſubſtitute another in his place; and that *Brown*'s being a notary public, gave him no more power to act as a keeper of the regiſter of ſaſines, than any other man in the kingdom. In ſhort, the preſent caſe was no better than if any perſon ſhould find a proper opportunity to cauſe his own ſervant write over the ſaſine in the regiſter, which certainly could never be held a due regiſtration againſt third parties, in terms of the act.

To the firſt objection it was anſwered, That, ſtrictly ſpeaking, there could be no ſuch thing as delivery of land, far leſs of an annualrent out of land; delivery applying only to moveable, not heretable ſubjects. That there might be occupation, or poſſeſſion, but not, in any proper ſenſe, delivery; and that to talk of delivery of an annualrent-right, *a jus incorporale*, was ſtill farther out of reach; at the ſame time theſe were common expreſſions, and the meaning thereof very well underſtood, and imported no more than that the bailie ſhould deliver a proper ſymbol, repreſenting in the imagination the ſubject itſelf. Thus, if a bailie is ordered to deliver an annualrent out of the lands, he performs his commiſſion when, ſtanding upon the land, he delivers earth and ſtone, and alſo a penny money. Theſe things premiſed, it is plain, the bailie did execute his commiſſion here in the moſt regular manner, by delivering the proper ſymbols of an annualrent right, *viz.* earth and ſtone, and a penny money, which was acting in the preciſe terms of the precept, which, in appointing delivery to be made of the annualrent-right, condeſcends at the ſame time upon the manner in which the ſame was to be made.

To the ſecond it was anſwered, That as the ſaſine was on record, the ſtatute which appoints regiſtration, does not require the ſame to be certified by the proper officer, under the pain of nullity. The only uſe of the certificate, is to give evidence of the recording; and if the fact be otherways known, or agreed upon, it is not a farthing matter whether there be any certificate or not. *2do*, A ſaſine is not null, by the act 1617, tho' not recorded; recording is only of uſe to give preference in a competition; here there is none. The defender's infeftment is prior in time, and therefore preferable, unleſs the purſuer had an objection againſt it, *viz.* That an infeftment upon an adjudication, within the years of preſcription, can never be an available right, without the grounds thereof, which is not yet produced. With regard to which point, it is of no earthly conſequence, whether the purſuer's ſaſine be recorded or not. Recording would not prefer it to the defender's prior infeftment; and

and ſuppoſing it not to be recorded, yet it is a real right, and a good oundation for a poinding of the ground.

The Lords repelled both the objections.

N. B. It is ſaid the ground on which the ſecond objection was repelled, was, that putting theſe words, *in abſence of Thomas Stewart notary-publick*, in parentheſis, then the atteſtation bears to be by the clerk-ſubſtitute, and that *Thomas Stewart* was the depute.

N° CCLIV. *December* 13. 1743.

Captain *Dundas* contra *Roderick M'Leod* Writer to the Signet.

1. *A cautioner before the Admiral-court* judicatum ſolvi, *is not freed by the principal defender's dying before ſentence.* 2. *Such defender's repreſentatives, tho' foreigners, may be called by an edictal citation.*

THE Captain, an officer in the *Dutch* ſervice, having enliſted ſeveral men, entered into a charter-party, with *Charles Greig* ſhipmaſter, for tranſporting his recruits to *Holland*: When the ſhip that they were to go in, came unto the road of *Leith*, the Captain ſent his men from *Leith* to the ſhip; but when he came there, he found one Lieutenant *M'Leod*, an officer alſo in the ſervice of the States, had taken poſſeſſion of the ſhip with another parcel of recruits, and would not allow his men to come aboard: Whereupon they returned to *Leith*, where ſeveral of them deſerted; and thoſe that remained put him to a conſiderable charge, before he got another opportunity of tranſporting them. Upon which the Captain brought a proceſs before the Admiral, againſt Lieutenant *M'Leod*, for recovering his damages: And to prevent the effect of a warrant which had been iſſued out for apprehending the defender, until he ſhould find caution *de judicio ſiſti et judicatum ſolvi*, *Roderick M'Leod* appeared, and became caution *de judicio ſiſti*, *&c.* After this the proceſs went on; a proof was allowed to both parties, which was adviſed, and the defender found liable in damages; but before decreet he died: Whereupon the Captain transferred his proceſs againſt the defender's repreſentatives, and decreet was pronounced againſt them; and the cautioner, *Roderick M'Leod*, ſuſpended on the following grounds, 1*mo*, Becauſe the obligation he came under was an acceſſory one, pendent entirely on the effect of the obligation that ſhould come out againſt the principal, and ſo fell under the rules that relate to cautionary obligations. That tho' the two different cautions *ſiſtendi et judicatum ſolvi*, are tacked together, yet there could be no doubt that the *ſiſtendi* was at an end by the defender's death; and, by the principles of the civil law, when the party dies the inſtance againſt the dead man is at an end; and until the proceſs and inſtance is renewed by an action againſt the heirs, no procedure can be had. The *lis* as to him is *mortua*, and conſequently the caution found falls to the ground; and when it is conſidered that cautionary obligations are in all caſes *ſtricti juris*, it was equitable and

juſt to circumſcribe it ſo that it ſhould not affect the cautioner, if the defender died before decreet was obtained againſt him; for this reaſon, If the action for the ſame thing was altered, the cautioner was free; or if the purſuer went from one judge to another, he was let looſe, according to the opinion of ſeveral lawyers. Now when the principal defender dies, there is a *mutatio perſonæ* in the litigation. It may be ſaid indeed, that an heir is *eadem perſona cum defuncto*; but, notwithſtanding this fiction of law, there is certainly a difference of perſons, tho', as to ſome effects, they may be conſidered as the ſame; *e. g.* the very calling an heir ſhows he is not conſidered, in every point of light, as *eadem perſona* with his predeceſſor, otherwiſe the citation of the predeceſſor would be ſufficient. In a word, the ſuſpender is bound for Lieutenant *M'Leod* only, and not for his heirs; he is bound only for what ſhall be decreed in this action againſt him, not in an action againſt his heirs; and as all *fide-juſſory* obligations ought to be ſtrictly interpreted, there does not appear any ſolid ground in law upon which he can be made liable.

2*do*, Suppoſing the cautioner were liable *judicatum ſolvere* what was decreed againſt the heirs, yet that ſtill ſuppoſes the court has a juriſdiction to decern againſt them: But the caſe here is, that the heirs of Lieutenant *M'Leod* called in the tranſference, are perſons living in *Holland*, and who never were in *Scotland* in their lives; ſo that the decree is plainly good for nothing, as being pronounced *a non ſuo judice*: So that here is the ſuſpender, a cautioner, decerned, where there is no principal; where if he ſhould pay, in obedience thereto, he can have no recourſe. See *Hodge*, 20th *January* 1680; *Stewart*, 16th *November* 1636, *l.* 2. *ff. judicatum ſolvi*; and *l.* 3. and 7. *eod. Tit.* Groenwigen *et* Bugnion *de legibus abrogatis*; Minſingerus *ad tit. inſtit. de ſatiſdat.*

Anſwered: That if the *cautio judicatum ſolvi* ſhall be found to be of no greater ſecurity, than that of ſiſting the perſon of the defender, when called in judgment, which is evacuated upon the death of the defender, a ſtranger who might be occaſionally here, and, as ſuch, with his effects ſubjected to the arreſt *juriſdictionis fundandi cauſa*, behoved to remain here never ſo long, till the event of the cauſe, altho' he had never ſo much credit abroad, or buſineſs to tranſact elſe where. It was therefore neceſſary, that another kind of caution ſhould be introduced, as well for the ſecurity of the purſuer, as the conveniency of the defender; and that was the caution *judicatum ſolvi*, that whatever became of the defender himſelf, whether he turned bankrupt, or by going abroad ſhould not be found, or if he ſhould die, the purſuer might be ſecured of his payment of what ſhould be decerned to him. It is for this reaſon, that enactments in maritime courts is not, that the cautioner ſhould be bound for the defender in whatever might be decerned againſt him, but *imperſonaliter judicatum ſolvi*; and if this were not the caſe, there would be little difference betwixt the caution for the defender's compearance, and that other caution *judicatum ſolvi*, that the acts and ſentences of the court ſhould be performed; ſeeing, in both caſes, the ſuſpender argues the cautioner ought to be free upon the death of the defender. There is likewiſe this other difference betwixt them, that a cautioner *judicatum ſolvi* is taken to be *fide juſſor totius cauſæ*, whereas the cautioner *de judicio ſiſti* is only taken to be *fide juſſor litis exercitationis*, to which our cuſtom does exactly agree; and when the action is finiſhed by decreet, the ſame goes out againſt both defender and cautioner at the ſame time, and diligence

may

may proceed againſt the cautioner himſelf, as well as againſt the defender, without charging the cautioner; becauſe, in ſuch caſes, there is no privilege of diſcuſſion betwixt principal and cautioner: Nor can the death of the defender be reckoned ſuch an alteration, as to free the cautioner, ſeeing his repreſentatives come in his place. To the *ſecond* reaſon of ſuſpenſion it was anſwered, That where the judgment is once founded by arreſt, whether of the original defender's perſon or effects, as in the preſent caſe, as decreet would have gone againſt the original defender by reaſon of the *juriſdictio fundata*, ſo it muſt regularly proceed againſt the repreſentatives, if the paſſive titles were proven, as in this caſe, or declaratorie, that the judgment may have its effect. See 14th *February* 1627 and 1632, *Pyrnon Voet* in his commentary on the title *Qui ſatiſcoantur*, § 10. and 11. *l.* 7. § 3. *ff. de fide juſſ.*

The Lords found, that a cautioner judicatum ſolvi, *before the Court of Admiralty, is not liberated by the death of the principal defender, before final ſentence; and that it was competent to bring the repreſentatives of the principal defender unto proceſs, tho' foreigners, by edictal citation; and that the ſaid repreſentatives were regularly brought into Court by this action; and therefore find, that in this caſe the cautionary obligation* judicatum ſolvi *does ſubſiſt.*

N$_o$ CCLV. *January* 5. 1744.

John Campbell Purſuer, contra *William Crawfurd* Defender.

A wife is an inhabile witneſs againſt her husband in a civil cauſe.

THE purſuer brought a proceſs againſt the defender, for the price of ſome ſheep he had ſold and delivered to him, in which the defender alledged that the ſheep had not been delivered to him, but to one Mr *Shaw* of *Dalton*; and that therefore he alone could be anſwerable for the price; upon which a conjunct proof was allowed to both parties, and the defender's wife was cited as a witneſs for the purſuer. Objected for the defender, That his own wife was an inhabile witneſs againſt him, as a wife's oath could not bring a debt upon a huſband without his conſent; which was introduced to prevent occaſions of diſcord, and breaches betwixt man and wife: And indeed it amounts much to the ſame thing, as if the huſband were called as a witneſs againſt himſelf, (to allow a wife to depone againſt her huſband) which no law allows, in reſpect of the abſurdity it involves in it, of blending characters together, altogether inconſiſtent. And for this reaſon it is, That where one undertakes to prove a point by witneſſes, and one witneſs has deponed upon the matters in controverſy, the ſame cannot thereafter be referred to the party's oath; and therefore, the whole that concerns any point muſt be referred to his oath as a party, or none of it *ob metum perjurii.*

The identity of intereſts ariſing from the communion betwixt man and wife, muſt alſo render her a very unfit witneſs in all queſtions touching moveables that fall under the communion; and this doctrine is agreeable to the principles of the civil law, and opinion of the doctors.

See

See *Stair, l.* 4. *tit.* 46. *l.* 4 and 5. *de teſt.* and *l.* 6. C. *eod. tit. Voet ad tit. de teſtibus,* § 4. and 5. *Maſcardus de probationibus, num.* 12. Wood's *Inſtit. l.* 4. *c.* 4.

Anſwered: That it was a rule of nature and juſtice, that every perſon, without exception, is bound to aſſiſt the injured with their teſtimony, in order to obtain redreſs. Neither does the civil law ſupport the defender's doctrine, particularly the *l.* 4. *de teſtibus,* as that law relates only to criminal caſes; and in fact, there is not one of thoſe relations ſpecially enumerate there, who are not every day called to give evidence.

In the next place, it may be obſerved, That after the defender had denied the delivery of the ſheep, it was certainly competent to have proved the contrary by his oath; for here was not what may be called the *legalis turpitudo.* How unreaſonable, therefore, is it to inſinuate a *metus perjurii* muſt excuſe a wife from ſwearing, when it could not cover the defender himſelf? Beſides, neither that, nor any danger of maltreatment from the huſband, are ſuppoſitions to be made; ſince every perſon ought to be ſuppoſed to do their duty. Beſides, deciſions ought to proceed on the rules of law and juſtice, whatever the inconveniencies may happen to be. See *Sande, lib.* 1. *defunct* 3. Bugnyon *de lois abrogees, lib.* 2. *cap.* 78.

The Lords ſuſtained the objection.

N°. CCLVI. *January* 11. 1744.

James Walker Charger, contra *James Cuming,* Deacon of the Fleſhers of *Edinburgh,* Suſpender.

Office-bearers of an incorporation, if liable in payment of an debt contracted by their predeceſſors in office.

ANNO 1715, the charger lent 100 merks *Scots* to the then deacon, boxmaſter, and maſters of the ſaid incorporation of fleſhers; and having charged *James Cuming,* the preſent deacon, on the bond, for payment, he offered a bill of ſuſpenſion, on the following grounds: 1*mo,* Becauſe, tho' the debt charged on may be juſtly due by the incorporation, yet no diligence ought to proceed againſt the ſuſpender's perſon or effects, unleſs he had the incorporation's money in his hands, or refuſed to uplift, recover, or diſpoſe thereof, for payment of the debt charged on, which is all that any office-bearer is bound to do, unleſs fraud can be made appear againſt him; more eſpecially, as this debt was contracted 28 years before the ſuſpender was a member of the incorporation.

Anſwered: By the tenor of the bond, the perſons therein bound, bind and oblige themſelves, and ſucceſſors in office, conjunctly and ſeverally, to repay the money to the charger; which clauſe muſt ſubject all the members of the incorporation, whether they were members at the time of granting the ſaid bond, or became ſo afterwards, not only to repay

pay the money, but to make them liable to perſonal diligence. The members of an incorporation can certainly bind their ſucceſſors in office as validly as themſelves; and if once a perſon enter himſelf a member of an incorporation, he is as much bound to fulfil the obligations of that ſociety, altho' entered unto by former members, as if he had entered unto them himſelf. The incorporation is conſidered as one perſon; and tho' the members may change, yet the incorporation is ſtill the ſame, and the members of it are as much ſubjected to its debts, as if they were contracted for their own private uſe; becauſe they are as effectually bound in payment in the one caſe as the other.

That a clauſe ſhould be inſert in a bond ſubjecting the preſent, and all future members to payment, and perſonal diligence; and yet not to give it effect, would be abſurd, when it was upon the faith thereof the creditor lent his money. By becoming a member, the ſuſpender has right to exerciſe his trade, and to enjoy all the privileges of the ſociety: Now, to have a right to theſe, and yet not be liable to the obligations of the incorporation, would be inconſiſtent. Beſides, the members of an incorporation are in the very ſame ſtate with heirs, who are reckoned *eadem perſona* with the defunct, and are in the ſame manner liable to his debts, that they are to their own.

Replied: The charger endeavours to introduce a new paſſive title, altogether unknown in our law, *viz.* That every man, by becoming a member of an incorporation, is as much liable to the debts of the incorporation as an heir; but the error lies in not diſtinguiſhing amongſt different ſorts of corporations; *e. g.* when a ſet of men is incorporated, with a view to carry on traffick, and with power to borrow and lend, there is no doubt the preſent office-bearers may be ſued for payment of money borrowed, as repreſenting the incorporation; but even in that caſe, the proper effects of the office-bearers will not be affectable by ſuch diligence. His perſon may be thrown into jail, as repreſenting the incorporation; but that is all the length that diligence can be extended againſt him. The effects of the incorporation may be attached for payment of the debt, but not the effects of any one member: The caſe of royal burghs will illuſtrate this, which is an incorporation holding lands of the King; and having of courſe a power to contract debt, the magiſtrates are liable, no doubt, to a ſummary charge for payment of any debt contracted by their predeceſſors: Nay, the creditor may proceed to incarcerate the magiſtrates, as repreſenting the town; but nobody ever ſuppoſed that their own proper eſtates could be adjudged for payment of any ſuch debt: But the preſent caſe is quite different; as this incorporation have a ſeal of cauſe, and are united *ad hunc effectum* only to bar any perſon from exerciſing that trade, without paying them a compoſition; and they have no power to contract debt *qua* incorporation; ſo that if any perſon lends them he can have no action, but in ſo far as he proves that it was in *rem verſam* of the ſociety.

Duplied: The holding lands of the crown, or a ſubject, can give no privilege to contract debt; and that the having, or wanting an heretable ſubject, will not in the leaſt alter the obligation to repay; and ſo the preſent queſtion will not depend on that principle. None of the royal burghs have a power in their charters to borrow money; and if they had, it would not be good, without it were confirmed by parliament. Such power does not depend on their grant, but on the members themſelves:

For a proof of this, the inſtance given by the charger of a company, incorporating together to carry on trade, and to borrow or lend, will ſuffice. The charger will not take upon him to ſay, there was any ſuch expreſs powers in this caſe, but the ſame thing has been done tacitly, and as effectually. Their giving authority to borrow, either by a ſederunt in their books, or by their ſigning the bond, and continuing ſuch a practice is *tantamount* as if each had ſigned a formal contract, empowering their office-bearers to borrow.

The Lords paſſed the bill, upon the ſuſpenders conſigning a diſpoſition to their effects.

N° CCXLVII. *January* 27. 1744.

Thomas Gairdner, &c. Creditors of Sir *Archibald Primroſe* of *Dunipace*, contra the Heirs of Entail of the ſaid Eſtate.

If a tailzie does not contain a ſpecial proviſion voiding debts coutracted, they will affect the eſtate, altho' the contraveener loſe his right by ſuch contravention.

SIR *Archibald Primroſe* of *Carrington*, tailzied his eſtate of *Dunipace* to a certain ſeries of heirs, and provided that none of the heirs of entail ſhould diſpone, or contract debts, whereby the ſame might be affected, or evicted, without the conſent of certain perſons: "And "if they ſhould do in the contrair, the heir of tailzie contraveening, "and the heir-male of his body, ſhall amit and loſe all right or intereſt "which they may have in the ſaid lands."

Upon this diſpoſition a charter was expede in the 1677, upon which infeftment followed; but the ſame was never recorded in the regiſter of tailzies. Sir *Archibald Primroſe*, ſon of the inſtituted heir of tailzie, having contracted ſeveral debts, his creditors led adjudications againſt the eſtate; and inſiſted likewiſe in a declarator, for having it found and declared, that there being no irritancy in this tailzie, declaring the debts which ſhould be contracted, void and null, but only that the heir contracting ſhould amit his right therein; therefore they could lawfully affect the eſtate for payment of their debts. In ſupport whereof, it was urged, that tailzies were unfavourable, and ought to be ſtrictly interpreted, ſo that creditors ſhould not be fruſtrated of their payment, or property further reſtricted than the ſame appears to be from the preciſe words of the tailzie. And here the intendment of the tailzie is, to tie up the hands of the heirs from diſpoſing, or contracting debts on the eſtate, for which purpoſe the irritating the heir's right was thought ſufficient ſecurity; but the intention could not be, that a juſt and lawful creditor, who ſhould lend his money to the heirs of tailzie, ſhould forfeit the ſame. See the caſe of the tailzie of *Keith Marſhall*; and 11th *July* 1734, Mr *James Baillie*.

Anſwered: Sir *Archibald* meant to preſerve the eſtate as well from eviction as alienation; and, if the purſuer's doctrine hold true, adjudications upon debts will affect the ſame, becauſe there is no irritancy of the debts provided for: So would a total alienation for the ſame reaſon be effectual,

fectual, which would altogether evacuate the tailzie. The only queſtion, therefore is, If the tailzie-maker executed his intention in a proper way? Upon this head it may be obſerved, that what made tailzies effectual before the act 1685, was, becauſe the heirs were conſidered as limited fiars; but this limitation could not be effectual to the heirs of tailzie, unleſs it contained a clauſe voiding the contraveener's right; hence came clauſes irritant and reſolutive. But the reaſon why a clauſe voiding the debts can have no effect is, becauſe it is not in the power of a third party to declare a contract betwixt third parties null. The heir remains debitor, and he who lent his money creditor, notwithſtanding ſuch declaration. But what makes the tailzie effectual is, that the proprietor diſpones his fee with what limitations he thinks fit, and with the condition that the contraveener ſhall make the ſubject forfeited, and deſcend to another. See 11th *March* 1707, *Riddoch*; 26th *February* 1662, Viſcount of *Stormont*.

The Lords found the debts might affect the eſtate.

N° CCLVIII. *January* 31. 1744.

Mrs *Margaret Lauder* contra Sir *David Baird* of *Saughtonhall*.

An heir of entail not liable for mournings, or an interim aliment to the widow of a preceding heir, unleſs the ſame is authorized by the entail.

THE eſtate of *Saughtonhall* deſcended to Sir *Robert Baird* by a tailzie, under irritant and reſolutive clauſes, but with power to the heirs of tailzie to give liferent proviſions, by way of locality, to their wives, the ſame not exceeding a third part of the ſaid lands.

Sir *Robert* intermarried for a ſecond time with Dame *Helen Hope*, to whom he gave a liferent infeftment, by way of locality, not exceeding a third.

Sir *Robert* died in *September* 1740, and his wife in the *April* thereafter; whereupon her repreſentatives brought an action againſt Sir *David Baird*, as heir to Sir *Robert*, (his father) for payment of *L.* 20, as aliment to the ſaid Dame *Helen Hope*, till the term of *Martinmas* 1740, when her liferent proviſion commenced; and likewiſe for *L.* 48 for mournings ſhe had taken off for her huſband; founding their plea on this, that a widow had a right to be alimented to the next term when her liferent commences, whether the proviſion in her favours be a legal or conventional one. That mournings was alſo of the nature of an alimentary proviſion, where the rank and quality of the widow render them neceſſary; that both were a debt of the huſband's. And, in this caſe, it ſeemed to be a conſequence of the tailzie, that the widow ſhould have both. Since it is plain, with reſpect to the aliment, that the intention of the entailzier was, that the widows ſhould be ſupported ſuitable to their rank and quality, conſequently ſhe behoved to have an interim aliment, until her jointure took place, otherwiſe ſhe might have ſtarved; and in the ſame manner it could never enter into the minds of the merchants who furniſhed the mournings to the widow, that a woman of her rank was not intitled to have them, or that the ſame would not affect the

the heir. Tailzies are indeed to be ſtrictly interpreted, where they lay a reſtraint on the heir; but where powers are given, diſpenſing with the reſtraints for neceſſary and honourable occaſions of the family, theſe powers ought to be amply and largely interpreted. Now, the clear and evident deſign of giving the heir a power to provide a wife, is, That ſhe may be ſupported ſuitably to the dignity of the family: And it was impoſſible this intention could be anſwered, unleſs ſhe had an interim aliment, and mournings for her huſband, the repreſentative of the family; therefore the tailzie can afford no defence in this caſe.

Anſwered: That, ſuppoſing mournings and aliment to the next term, are conſidered as a debt of the defunct's, yet it will not affect the defender as heir of entail, unleſs the purſuer will ſhow, that it is warranted and authoriſed by the entail: Now it is impoſſible to plead, that the power of granting localities, neceſſarily comprehended under it mournings and aliment. It is true, that in the ordinary caſe, where the huſband is abſolute proprietor, and grants a liferent-locality to the wife, that ſhe has a claim for an interim aliment till the ſame become payable; but this does not ariſe from the nature of a liferent-locality; it ariſes from the natural obligation upon the huſband to aliment his wife; and, as to the argument drawn from the entailzier's intention, the preſumption lies quite the other way; as, from the conception of the clauſe, the power of the heir in poſſeſſion, is declared not to operate ſo as to burden the eſtate, or ſucceeding heir, with any thing to the wife; for as her proviſion is to be by way of locality, ſo it is anxiouſly provided, that whatever rents of the local lands might be reſting to the wife, the ſame ſhould not affect the eſtate after the locality is at an end. And altho' the wife's claim for aliment and mournings, may be called a *debitum humanitatis*, yet ſuch debt cannot compete with other lawful creditors; and it would look odd, that a debt which is poſtponed to all others, ſhould yet affect an heir of entail, who is not liable for the moſt onerous contract of the preceding heir.

The Lords found, that Sir David Baird *is not in this caſe liable, as heir of tailzie to his father, either for mournings, or aliment to his widow.*

N° CCLIX. *February* 3. 1744.

Alexander, &c. *Bairds* contra *Adam Greig* Merchant in *Kilmarnock.*

An infant ſurviving his mother, and then dying, tranſmits her third of moveables to his father, tho' he neglected to confirm his child's third, or to make any diviſion thereof from the other goods in communion, the father's poſſeſſion being deemed the child's.

THE ſaid *Adam Greig* married one *Margaret Baird*, with whom he entered into no written articles, or marriage-contract. The wife died, leaving an infant-ſon of the marriage, who likewiſe dying a few months after the mother, her brothers and ſiſters, as neareſt of kin to the

the deceaſed wife, brought a proceſs againſt the defender for the third part of the free goods in communion belonging to him, in reſpect the child had died without being confirmed to his mother's third.

For the defender it was pleaded, That as he was a merchant, whoſe whole ſtock conſiſted in moveable or ſhop-goods, he had continued to diſpoſe or ſell them as cuſtomers offered, after his wife's death, in the ſame manner as he had done before; that his infant ſon had attained poſſeſſion in the ſole and only manner he was capable by the act of the defender, who was his adminiſtrator in law, and who was intitled and obliged to act for his own child an infant, that could not act for himſelf. And herein lies a material difference betwixt the preſent caſe and that of *Mary M'Whirter*, (lately determined) as the ſon in that caſe was paſt the years of pupillarity at the death of his mother, and ſo capable of acting for himſelf, as every minor muſt do; whereas tutors or adminiſtrators for a pupil or infant, muſt act for him; and ſuch act is, in the eye of law, the deed of the pupil himſelf, eſpecially when *de ejus commodo agitur;* and his *commodum* it muſt be taken to be, that he ſhould be veſted in the right of the moveables that fell to him by the death of his mother, in the method that would be moſt effectual and leaſt expenſive; that is, by poſſeſſion of the goods themſelves, without the unneceſſary charge of confirmation. In the caſe quoted, as the ſon was of age to act for himſelf, conſequently ſome evidence was requiſite to ſhow that he had attained poſſeſſion; becauſe, the ſingle act of the father was not his act; but in the preſent caſe, the infant could not act for himſelf, therefore his father's acting muſt be deemed his; and if the goods were veſted in the ſon by poſſeſſion, the defender, as heir to his own child, has the only right thereto.

For the purſuers it was anſwered, That the only qneſtion here was, Whether the infant acquired poſſeſſion, yea or not? and with reſpect to this, it was obſerved, that as the father was debtor in this third to the child, and ſtill continued the natural poſſeſſion, without ſo much as making any diviſion with it, by giving the third to any body to be kept for the infant's behoof, or making any inventary thereof, the purſuers were at a loſs to figure how the father's poſſeſſion could be deemed the child's, when he the debtor did no act or deed by which his part could be diſtinguiſhed from the ſon's. Nor can it make any difference, whether the child is a pupil or minor, ſeeing in both caſes there muſt be ſome act or deed of the father's, ſhowing there was an actual diviſion, and poſſeſſion following thereon, in order to veſt the goods in his perſon; and if the father neglect to do this, or confirm his ſon, *ſibi imputet* if the third goes away by law to the neareſt of kin of the deceaſt wife: In a word, the propoſition the defender maintains, is, that there muſt be a real diviſion and poſſeſſion given to the child *aliquo modo*, otherways the neceſſity of confirmation is not taken off: And if no evidence were required of the child's getting poſſeſſion, this abſurdity would follow, that whereever a child died in pupillarity, there the neareſt of kin would be always cut out of their claim, on pretence of the father's being adminiſtrator in law. It is true that the act of the tutor is, in the conſtruction of law, the act of the pupil, eſpecially when *de ejus commodo agitur;* but that maxim does not apply to the caſe in hand, where the father did nothing to diſtinguiſh betwixt his and the child's third. If indeed moveables were to fall to an infant *jure ſucceſſionis*, there, if the father got poſ-

ſeſſion, the ſame might be deemed the child's, becauſe the father as adminiſtrator had obtained poſſeſſion *nomine infantis*. But, where the father is debitor himſelf, the caſe is quite different; and the law will never ſuppoſe diviſion or poſſeſſion given, when in fact it is acknowledged there was none; and, as the child is now dead, it is quite out of ſight to plead that his *commodum* is concerned, to ſuppoſe the goods were veſted in his perſon, to avoid the expences of confirmation, when the preſent queſtion is by no means with him.

The Lords found the father's poſſeſſion to be the child's poſſeſſion, and preferred the father to the wife's neareſt of kin.

No CCLX. *February* 21. 1744.

Sir *Patrick Murray* contra the Truſtees named in his grand-father's ſettlement.

A witneſs may be examined on interrogatories, tho' his anſwers may involve himſelf in a malverſation in his office.

THE deceaſed Sir *Patrick Murray* of *Ochtertyre* made a ſettlement of his money on truſtees, for certain purpoſes. After his death the ſame was deſtroyed, whereby his ſon got acceſs to the money, which he ſquandered; whereupon Sir *Patrick Murray*, the grand-child, brought an action againſt the truſtees, as having, contrary to the truſt repoſed in them, entered into an unlawful combination with the purſuer's father, to deſtroy the ſettlement upon agreements, by which they themſelves were to have a ſhare. In the courſe of this action, *Murray* of *Dullary* Sheriff-clerk of *Perth*, was adduced as a witneſs, and certain interrogatories given in for the purſuer, ſuch as, Whether the ſettlement was given in to the ſheriff-clerks to be regiſtered, and at whoſe deſire it was given in? And, Whether he ſaw any extract of it, and with whom he ſaw it?

Objected by the witneſs, that he was not bound to anſwer theſe queſtions, as his anſwers might involve himſelf in a malverſation in his office; that it was againſt the rules of law, that any man upon oath ſhould be obliged to anſwer, what might bring either ſtain or puniſhment upon himſelf, or ſubject him to a penalty or forfeiture: That, as the witneſs was ſheriff-clerk, and keeper of the records, if the caſe ſhould happen that he was to depoſe any of the warrants of the records were given up, then he came to be liable and ſubject to cenſure.

Anſwered: That the purſuer hoped the witneſs had done nothing in his office, but what he could juſtify: That there was no proſecution againſt him of any kind: That facts within his own knowledge were material for the purſuer in this proceſs; and that if a witneſs, by pretending his anſwers might hurt himſelf, could evade an examination at the inſtance of a purſuer againſt third parties, it would be a ſtanding ſcreen for every witneſs who might be called to tell the truth. That the witneſs had deputies, conſequently the extract might be taken out, and he not guilty; he might have other juſtifications; but his ſtanding mute, and refuſing to anſwer, was taking guilt to himſelf. That the queſtions

were

were not directed upon the witneſs, Whether he gave up the warrant or not? but, Whether the ſettlement was given in to the ſheriff-clerks to be regiſtered, and at whoſe deſire? and if ſuch an objection were to be gone into, it would be attended with great inconveniencies.

The Lords repelled the objection.

N. CCLXI. *February* 24. 1744.

William Mackilhoſe Maltman in *Glaſgow* Charger, contra *James Reid* Wright there, Suſpender.

1. *Concert betwixt a debitor and his creditors, that they ſhould accept certain effects in full ſatisfaction, if competent to be proven by witneſſes.* 2. *If ſuch creditors agreeing to defend ſuch concert, are habile witneſſes.*

THE ſaid *James Reid* having ſold certain tenements belonging to him in *Glaſgow*, his creditors arreſted the price in the hands of the purchaſer, and, in order to avoid expences, they agreed to paſs from their arreſtments, and to divide the price equally amongſt them, in proportion to each man's debt. The proportion of the price which fell to be drawn by *William Mackilhoſe*, one of the creditors, did not near pay his claim; whereupon he did diligence againſt *Reid* for the balance; who ſuſpended on this ſingle ground, that it was a branch of the concert, that the whole creditors ſhould take themſelves to the above price, in place of full payment, and ſhould accordingly give him a full diſcharge of their whole debts. *Mackilhoſe* having denied the fact, a proof was allowed.

Objected for the charger, That the proof by witneſſes was not competent in this caſe. 1*mo*, Becauſe, tho' a concert amongſt creditors to accept of a proportion of the price, toward payment of their debt, would be competent, yet a concert to accept of the debitor's effects in full payment of their debts was not competent, the ſame being gratuitous, which cannot be proved by witneſſes: In the next place, taking it as ſet furth in the ſuſpenſion, that each of the creditors agreed to ſign a formal dicharge, there could be no doubt, but that there was *locus pœnitentiæ* before writ interveened. 2*dly*, The charger objected againſt two of the three witneſſes adduced, that, tho' their being creditors did not diſable them, yet he had diſcovered they had ſubſcribed a deed obliging themſelves to be at the expence of defending this proceſs, which made them parties in this cauſe, conſequently diſabled them from being witneſſes.

Anſwered for the ſuſpender: The concert could not be divided, but behoved to be taken as it ſtands; and that a concert amongſt creditors to accept of a proportion of their debt, in full ſatisfaction, was noways ſimilar to a gratuitous promiſe. That when a debitor ſurrendered all his effects to his creditors, it was a tranſaction to avoid the exhauſting the ſubject by expence of diligence, which was moſt favourable, and indeed rather to be preſumed, than that the creditors keep up the remainder of their debt to haraſs the debitor, and deprive him of bread.

And

And with reſpect to the objection to two of the witneſſes, it was anſwered, that the creditors had been allowed to be witneſſes by the Lord Ordinary's interlocutor, awarding the proof; that they were neceſſary from the nature of the thing, as none other was poſſibly preſent but the creditors and debitor. If then the creditors were liable, it could be no objection, that they were to be at the expence of defending this proceſs. It was their common intereſts to ſupport the concert, and no body could be ſuppoſed to lay out expences in doing it but them, eſpecially as the debitor had nothing of his own. The creditors indeed are in effect parties, yet they are good witneſſes in this caſe, being neceſſary, as none others are preſumed to be preſent; and it was a chance there was another preſent, who, as he concurs with the two creditors who have been adduced, confirms their teſtimony beyond the power of ſuſpicion.

The Lords found no ſufficient evidence of the alledged agreement; and found the letters orderly proceeded.

N°. CCLXII. *February* 28. 1744.

Campbell of *Carquhine*, contra the Magiſtrates of *Banff*.

If a preſent ſet of magiſtrates, &c. can be liable, as repreſenting the community, for the delicts or neglect of a former ſet.

CAMPBELL of *Carquhine*, *&c.* having purchaſed a quantity of victual from *Ogilvie* of *Rothiemay*, to be delivered at *Portſoy* or *Banff*, ſent a veſſel to receive it. Accordingly it was delivered, and ſhipped on the 8th, 9th, and 11th of *May* 1741: But, on the ſaid 11th, a number of the inhabitants of *Banff* conveened in a riotous manner, ſecured the men on board the ſhip, and took away part of the victual; and which they repeated next day, carrying then off a greater quantity. When the ſhip was unloaded on the 11th, the maſter intimated to the Magiſtrates the violence he had ſuffered, and that he dreaded the like attempt next day; which accordingly happened, but no meaſures were taken to ſtop the mob, nay ſome of the rioters were taken and put into the Magiſtrates hands, but were thereafter diſmiſſed. Upon which the owners of the victual brought an action againſt the Magiſtrates on account of their neglect, to have them liable for damages.

The defence offered, was, that there was no law making the Magiſtrates, *&c.* of a town liable for the delict, or negligence of perſons formerly in the magiſtracy, *&c.* and which ought only to affect thoſe that were guilty.

The Lord Ordinary ſuſtained the defence. The purſuers reclaimed, and pled, That, tho' it was a maxim in law, that *noxa caput*, &c. and, therefore, innocent Magiſtrates ſhould not be found liable; yet there were many caſes where criminal facts and delicts committed by thoſe repreſenting an *univerſitas*, affected the community: The purſuers don't mean to ſay, that if Magiſtrates, as private men, break the law, that in ſuch a caſe the community would be anſwerable; but if the offence or

failure

failure consists in the discharge of the trust reposed in them, in such a case the community is answerable for them. It is true that several law yers lay it down as a rule, that, before an university can be made liable, the offence to be done should be committed *concilio congregato*, &c. But this admits of many exceptions, particularly where it consists of many repeated acts, (as in this case) which in law is always constructed to be an ratihibition, and approbation thereof, if no measures were taken to prevent it; especially if means can be condescended on, by which the suffering might have been prevented. 2*dly*, Where goods are violently seized, if the Magistrates forbear, or neglect to take proper means of recovering them out of the hands of those who retain possession. 3*dly*, Where Magistrates can be proved to have refused, or neglected to take proper measures offered to them for stopping the violence used to the members of their community. Now where all these circumstances do concur, as the pursuers offer to prove they do in this case, it is believed the present set of Magistrates, as representing the community, ought to be made liable. See *Gomesius* in his *resolutiones de delictis*, cap. 1. N°. 52. and *sequen. Mascardus de probationibus con.* 1421. And *Farinacius de delictis, lib.* 1. *tit.* 3. N°. 120.

The Lords refused the petition.

N°. CCLXIII. *February* 1744.

Competition betwixt *John Wodrop* Trustee for the creditors of *Grierson* and *Gairns*, Merchants in *Edinburgh*, and Mess. *Fairholm* and *Alexander Arbuthnot* and Company.

ACT 1621.

GRIERSON and *Gairns* having shipped a cargo of brandy, *&c.* from *Holland* for *Norway*, the ship was driven (by stress of weather) up the *Forth*, where *John M'Naughton*, Collector of the customs at *Anstruther*, seized the same as run goods: Upon which the owners brought an action of trespass against him before the Court of Exchequer, concluding damages, for unlawfully seizing their property. This cause came on in *Candlemas* term 1741-2, and on *Whitsunday* term thereafter; in both which terms it was put off at the defendant's request, he paying costs of suit. At last, on *Whitsunday* term 1743, the cause was determined, when the plantiffs recovered a verdict for *L.* 210 *Sterling* of damages, and likewise *L.* 55 *Sterling* for costs of suit.

In *August* 1742, Messrs *Fairholm* and *Arbuthnot* in company, being creditors to *Grierson* and *Gairns*, arrested in the hands of *M'Naughton* all sums due by him to their debitor; and, on the 14th of *June* 1743, *Grierson* and *Gairns* assigned over this claim against *M'Naughton*, to their creditors, which assignation was intimate the next day: Arrestment was likewise used by *Alexander Arbuthnot* and Company, in the hands of *MacNaughton*, on the 17th *June* 1743. These claimants having intimated their claims to *M'Naughton*, he raised a multiple-poinding.

For the truſtee it was pleaded, that he ought to be preferred to Meſſrs *Fairholm* and *Arbuthnot*, becauſe the arreſtee was not debitor to the common debitor at the date of their arreſtments, which was laid on long before the judgment given in Exchequer; which was evident from this, that the common debitors might have deſiſted from the action, or might have diſcharged the ſame againſt the arreſtee; in either of which caſes the arreſters could have had no remedy. The verdict of the jury did indeed conſtitute him a debitor in a ſpecial ſum therein expreſſed; but this was done poſterior to the arreſters diligence; and that it is *triti juris*, if the arreſtee is not debitor to the common debitor, the time of the arreſtment, no ſupervenient debt will be affected by the prior arreſtment, which ariſes from the conception of the diligence, rendering litigious the effects of the common debitor in the hands of the arreſtee, only at the very point of time it is laid on, and has no concern with what happened before, or is to paſs afterwards.

In the next place, the truſtee ought likewiſe to be preferred, in virtue of his aſſignation, to the arreſters, with reſpect to the ſum awarded in name of coſts of ſuit; not only for the reaſons already given, but likewiſe, in reſpect no part of theſe coſts of ſuit were laid out at the date of the arreſtments, nor for ten months thereafter. That it was not eaſy to diſcover, how an arreſtment laid on, not only before theſe expences were modified by a judge, but before any part of them were incurred, or laid out by the common debitors, could be the foundation of a furth coming for theſe expences or coſts. That arreſtments did not reach *acquirenda*, was certain; and, that the common debitor had no right to them till they were modified by a proper judge, was equally certain: Surely they had no title to demand them from the arreſtee untill they were laid out, conſequently the arreſters (who muſt put themſelves in their place) can have no right whatever to theſe expences.

For Meſſrs *Fairholm* and *Arbuthnot* arreſter it was pled, That the aſſignation granted by the common debitors to the truſtee, was the deed of perſons inſolvent, under diligence of horning and caption at the time, clearly in defraud of the arreſters diligence, and to convey away the ſubjects, to their prejudice, to other creditors, whom the diſponers favoured more, and who had done no diligence at all; and therefore the aſſignation, tho' it might denude the cedent, could not be ſet up to compete with the diligence of any lawful creditor, far leſs with them, in defraud of whoſe more timely diligence the aſſignation was made, only two days before the judgment was recovered; and, that the aſſignation was granted on purpoſe to exclude their arreſtments, is evident from a clauſe therein, which debars ſuch creditors as did not paſs from their diligence, from having any benefit thereby, ſo that it was plain the aſſignation was null, and reducible on the act 1621. If this point is with the arreſters, as they apprehend it is, it ſuperſedes entering into the argument, How far arreſtment was proper and habile before judgment actually recovered? and particularly, Whether it can carry the ſum awarded for coſts, which are ſaid to have been incurred after the arreſtment was uſed, as they uſed another arreſtment after judgment had been recovered, which muſt for certain carry the ſubject if the aſſignation is null? But, ſuppoſing it was not null, they apprehend that arreſtment was competent during the dependence; and, as their arreſtment was long prior to the aſſignation,

it

must give right to what came afterwards to be decerned, in name of damages and coſts. Here it may be proper to obſerve, that the aſſignation itſelf was prior to the judgment, as well as the arreſtment. And it would be a very extraordinary doctrine, that a debitor ſhould be poſſeſſed of a right, which he might convey by voluntary aſſignment; and yet that right was not affectable by the diligence of his creditors. Every ſubject a debitor is poſſeſſed of, and every claim he has, is affectable by ſome one diligence or other, for payment of his debts: And, as arreſtment was the only diligence for affecting this claim that *Gairns and Grierſon* had againſt *M'Naughton* for ſeizing their goods, the arreſtment was therefore habile and competent, and did ſtate the creditors in the right of their debitor: It was indeed uncertain before judgment, Whether *MacNaughton* was debitor to *Gairns and Grierſon*; for, if he had been acquit, all demand muſt have ceaſed: But the claim, ſuch as it was at the time, was carried by the arreſtment; and the arreſters had right to whatever came in the event to be decerned to *Gairns* and *Grierſon*; nor can it be admitted, that they could have deſiſted or diſcharged their action after arreſtment was uſed, to the prejudice of the arreſters, who had right, as judicial aſſignees, to have followed furth the claim competent to their debitor. See 12th *June* 1734, *Snee.* 3d *February* 1736, Earl of *Aberdeen.*

The Lords found the aſſignation reducible upon the act 1621, *here having been diligence by horning at Meſſrs* Fairholm *and* Arbuthnot, *and* Alexander Arbuthnot's *inſtance, prior to the granting of the aſſignation; and preferred the arreſters.*

N° CCLXIV. *June* 10. 1744.

Margaret Lauder and her Huſband Purſuers, contra *Patrick Murray* of *Cherrytrees*, Defender.

1. *Objection to a bill, that it bore intereſt from the date to the term of payment.* 2. *Objection to a bill that it bore intereſt from the date until paid.*

THE purſuers having right to two bills, due by the defender to the deceaſt Mr *Lauder* Miniſter at *Eccles*, brought an action for payment.

Againſt the firſt bill it was pled, That the defender had been hooked in by the ſaid Mr *Lauder* to grant a bill for the price of a watch payable at his marriage, at a time when Mr *Lauder* was thought ſo old as to be paſt thoughts of marrying, and for near five times the value of the watch. In ſuch a caſe he could not be blamed to plead every legal objection againſt the bill; and there was an obvious one, which lay to the form of the bill, now purſued on, which had come in place of the

the original one, *viz.* that it bore a clauſe with intereſt from the date, which was urged to be inconſiſtent with the nature of a bill, before the term of payment, (which in this caſe was the term of *Lambas* after the date); and that any clauſe thrown into a bill, foreign to the nature of it, vitiates the ſame, and renders it void and null. 2*do*, That ſuch a clauſe is not implied in the nature of a bill, but altogether extraneous to it: It is changing the nature thereof, from being a bag of money, to make it a permanent ſecurity, *a feodum pecuniæ*, like a bond which behoved to exclude the *jus mariti* and ſingle eſcheat.

With reſpect to the 2d bill, which was payable at the *Whitſunday* after it's date, it was obſerved, that it bore a clauſe, *with intereſt from the date thereof, until the ſame be paid:* But, in regard that this bill was better founded in equity than the firſt one, the defender declared he was always willing to pay it; only he ſubmitted, Whether he ought to pay intereſt upon it before the term of payment?

To the objection to the firſt bill, it was anſwered, That all bills bearing value in the accepter's hands at the time of the draught, do, by their own nature, carry intereſt along with them; and, when a ſuit is brought on ſuch, intereſt is always awarded *nomine damni*.

2*do*, A foreign bill, though it does not expreſs intereſt, exchange, *&c.* yet, by diſhonouring thereof, all theſe become due by law, and the practice of merchants.

3*dly*, It would be abſurd to ſuppoſe, that the expreſſing in a bill what is naturally implied in it, could vitiate it *in totum*.

4*thly*, It would deſtroy whole companies, amongſt whom nothing is more common than to include in the bill itſelf the annualrents, from the date till the term of payment; and this practice has been confirmed by a courſe of deciſions. See *December* 1727, *Henderſon*. *June* 1737, *Dinwoodie*. *December* 1738, *Gilhagie*.

And to the claim for intereſt on the 2d bill it was anſwered, That, as the defender acknowledged the bill was well founded in equity, it followed, that the purſuers were intitled in juſtice to have the legal intereſt for their money. 2*dly*, That *Whitſunday* 1712 is the term fixed for the payment of the bill, and the adjection of theſe words, *With intereſt thereof until the ſame be paid*, means no more but that it ſhould bear intereſt from the date till the above term of payment, whereby it does not differ from the other bill.

The Lords repelled the objection to the firſt bill, and likewiſe to the ſecond, in reſpect the defender acknowledged the debt to be juſt.

CCLXV.

No CCLXV. *June* 5. 1744.

Alexander Fairly of that ilk, Purſuer, againſt the Earl of *Eglinton* Deſe nder.

One cannot build a dam-dyke croſs a river, ſo as to make the water regorge to the prejudice of a neighbour's mill, even tho' he is willing to pay the expence of altering the mill, in order to remove the hurt ariſing from the reſtagnation.

THE purſuer being proprietor of the mill of *Leath*, built paſt all memory of man on his own property, brought a proceſs againſt the Earl, to have it found, that he ought to be decerned to throw down a mill and mill-dam, begun to be erected by him on the river *Irvine*, about a quarter of a mile below the purſuer's mill; or at leaſt to lower the mill-dam run quite croſs the channel of the river, whereby the water regorged back on the purſuer's mill-wheel, which prejudiced it.

The Earl, in order to remove any cauſe of complaint, offered to raiſe the purſuer's mill-wheel at his own expence, which it was ſaid would give him a better going mill than ever it had been. *Fairly* rejected the offer; whereupon this queſtion occurred, Whether he was bound to alter his mill for the conveniency of his neighbour, tho' without damage to himſelf? or, which comes to the ſame, Whether *Fairly* was bound to ſuffer it to be altered by the Earl, even ſuppoſing the alteration to be noway detrimental to him?

In ſupport of the action, it was pled for the purſuer, That, by the laws of all civilized nations, liberty and property have always been held ſacred; that, abſtracting from contracts, no man was bound to ſubject either himſelf or his property to the will of another; and to make any man or his property ſubſervient to the benefit of another, was a plain contradiction to that principle. If the defender was intitled to alter the form of the purſuer's mill, this was giving him a power over it: It was proper therefore, to examine where this power or right was founded. The purſuer was abſolute proprietor of his own mill; this, as it includes the power of diſpoſing the ſame, ſo it excludes any ſort of power in another: Both theſe things are included in the idea of abſolute property. Now, if intereſt alone is ſufficient to give a man a power over his neighbour's property, ſuppoſing the reſtraint is noways detrimental in any pecuniary view, it muſt follow, that one's property muſt be ſubject to his neighbour's intereſt, unleſs he can qualify ſome damage. This is ſurely not tenible; for no man has a power to plant a hedge, or drive a level in another's property, tho' it were beneficial to both, without his conſent, the law cheriſhes freedom and independency, making every man arbiter of his own actions and property, without any other limitation than that of abſtaining from doing harm to others. If it be once eſtabliſhed, that a man has power over his neighbour's property, to make any alteration therein, provided it be not for the worſe, it follows, that the ſame power ſhould ſubſiſt even where the alteration is to the worſe, provided he be ready to make up the proprietor's loſs, there is no ſtopping ſhort. So much on the general point, taking it for granted that the alteration can have no bad

effect: But with reſpect to the point in hand, it deſerves to be conſidered, that water-engines of all kinds are nice machines, ſo that even people of the beſt ſkill cannot foreſee all the effects, good or bad, that may happen upon altering the ſhape or form of the engine. One thing is certain, the purſuer's mill went extremely well before the defender's mill-dam was reared up; it cannot be ſo certain what effect the alteration may produce. Is not this very thing a damage, to have uncertainty impoſed on the purſuer inſtead of a certainty, and a damage at the ſame time which cannot be liquidated?

For the Earl it was pled, That it was highly invidious for the purſuer to inſiſt on his point of right, and that he was not obliged to allow any alteration to be made on his mill, (tho' at the defender's expences) ſince he could not qualify any damage, which was uſing his property emulouſly to his neighbour's prejudice; a thing the law did not allow of. That both parties were equally intitled to erect mills on their reſpective properties; and as preſcription does not enter into the preſent queſtion, the point of right could not depend upon the accident, whether the purſuer's or defender's mill was firſt erected. The caſe therefore behoved to be conſidered, as if neither party had as yet built a mill upon this river, and that the Earl propoſed to erect one on his own property, the purſuer ſhould object thereto, on account that the water regorged beyond the boundaries of the defender's property; and, in that view of the caſe, the queſtion would be, If the law conſidered this to be ſuch an encroachment upon the purſuer's right, that the defender ſhould therefore be obſtructed from building his mill. Upon this point it was obſerved, that the channel of a river, from head to foot, is a common property, ſo far at leaſt as to be ſubſervient to the receiving the water which naturally compoſes that river; and therefore, ſo long as the water is not increaſed by any *opus manufactum*, ſo as to overflow the banks, or otherways prejudge the adjacent grounds, no heretor, under the notion of his property in the channel, can complain that the ſame is invaded, tho' it ſhould ſo happen, that, by reaſon of a mill-dam built by the *dominus* of the inferior grounds, the quantity of water ſhould be encreaſed outwith the line of marches, providing it thereby neither overflowed the banks, nor prejudged the adjacent grounds; conſequently, the law cannot conſider this caſe as any encroachment on *Fairly*'s property, ſo as to debar the Earl from his natural right of erecting a mill upon his own ground. And upon the ſame ſuppoſition that the purſuer had not built a mill, but ſhould have occaſion to erect one afterwards upon his own grounds, which would be hurt by the reſtagnation of the water, it would be a good anſwer to ſay, Raiſe, or allow your mill-wheel to be raiſed a few inches, which will remove the inconveniency. Now, if the law would have ſtood thus, when *Fairly* was firſt erecting his mill, it is hard to conceive that there ſhould be a *jus quæſitum* in this reſpect, by the purſuer's building a mill, before it was foreſeen that the defender would have occaſion to erect one upon his ground. In a word, all that can be demanded in juſtice is, that *Fairly* be indemnified of any expence that has been occaſioned by the Earl's neglect of interpoſing to regulate the form of *Fairly*'s mill when firſt erected. And it is a jeſt to ſay, that water-engines are nice machines, which even people of ſkill cannot with certainty know what prejudice may ariſe upon altering the form of them, ſeeing ſuch water-mills, as thoſe in queſtion, are of all others the groſſeſt, and, generally ſpeaking, may be made to go

with

with a leſs power of water than is uſually required: If indeed there was a ſcarcity of water in the river, there might be ſome ground for oppoſing the alteration propoſed; but that will not be alledged, there being more water in the river *Irvine* (except in time of froſt) than is ſufficient to ſerve all the mills that can ever be built on it. See *l.* 1. § 12. and *l.* 2. § 5. *De aqua et aquæ pluviæ arcendæ* Voet. *lib.* 29. *tit.* 3. § 2.

Replied, That it was a principle in law, that *in ſuo hactenus facere licet, quatenus nihil in alienum immittat*, which really imported no more than that one cannot uſe his neighbour's property; and for a man to take the liberty to direct his water upon his neighbour's ground, or to throw his ſtones upon it, is plainly uſing or making free with his neighbour's property. On the other hand, a man cannot be reſtrained from making uſe of his own property, or from acting within it, whatever conſequential damage may follow to a neighbouring proprietor. This is called by *Ulpian* the *lucrum ceſſans*, without attending to the diſtinction betwixt *damnum datum, et lucrum ceſſans, e. g.* to ſay, that I can lay my ſtones, or throw my water upon another man's property, is, in other words, ſaying, I have a poſitive ſervitude upon him; for we have no other idea of a poſitive ſervitude, than that of another's property being ſubjected to my uſe. And, on the other hand, to ſay, that I cannot build a houſe, becauſe it may obſcure my neighbour's lights, or dig a pit, becauſe I may drain his water, is, in other words, ſaying, that he has a negative ſervitude upon me. In ſhort, it is certainly true, that every man may do a lawful act *in ſuo*, without regard to the conſequential damage he may thereby do his neighbour; but the caſe here is, that the defender has done an unlawful act *in ſuo*, whereby he has thrown the water back upon the purſuer. As to the obſervation, that no man can uſe his property, emulouſly to the prejudice of his neighbour, it does not apply to the preſent caſe, as the purſuer is doing nothing in his property that can hurt or prejudice his neighbour; and, if it did, it would apply againſt the defender, for it is he who is plainly acting in that manner. Neither is the argument of any avail, that the channel of a river is common property, ſo that none can complain of an *opus manufactum* therein, tho' the conſequence is to make the water regorge; for the queſtion is not here of a navigable river, but of one that is not navigable, which is a part of every man's private property, thro' whoſe grounds it runs. When the defender then, by an *opus manufactum* in his own part of the channel, makes the water regorge upon the purſuer, it is truly uſing his neighbour's property for his own conveniency, which no man is intitled to do. To conclude, before the defender's dam-dyke was built, there was a good foord in the river, a little below the purſuer's mill, which led to ſeveral market towns; but ſince that time, it is not paſſable in winter, and even in ſummer it is deep. 2*dly*, By means of the defender's dam-dyke, the water is always three foot deeper at the foundation of the purſuer's dam-dyke than formerly; which makes it impracticable for him to repair any breaches therein, unleſs when the defender is pleaſed to let out his ſluices, 3*dly*, If the purſuer were to agree to the elevation of his wheel, he would thereby loſe a conſiderable force of water which he poſſeſſed formerly, and muſt be conſidered as his property, which he is not bound to part with for the conveniency of his neighbour, even for a price. See *l.* 8. § 5. *Si ſervit vindicet. l.* 26. *De damno infecto, l.* 1. § 12. and *l.* 2. § 5.

§ 5. *in fine, de aqua et aquæ pluviæ arcen. Heringius de Molendinis,* as cited by *Dirleton.*

The Lords found, that the defender has right to inſiſt, that the purſuer's mill may be ſo altered in its form, upon the defender's charges, as that his (the purſuer's) mill may be, and continue a ſufficient going mill; and, at the ſame time, the defender have the uſe of his property, by building or maintaining a mill of his own further down the river, without prejudging the purſuer's mill, or throwing any damage or loſs upon him.

But upon a reclaiming petition and anſwers, *The Lords found, that the defender could not lawfully, without conſent of the purſuer, build a dam-dyke a-croſs the river of* Irvine, *ſo as to cauſe the water reſtagnate upon the way-gang of the purſuer's mill, and thereby prejudge or hurt the going of the mill-wheel in the way it uſed to go formerly; and that the purſuer is not obliged to alter or ſuffer any alteration to be made on the form of his mill, or change the poſition of his mill-wheel, in order to avoid the prejudice that may be occaſioned by the reſtagnation of the water; and that the defender has no right to inſiſt on making ſuch alterations on the purſuer's property.*

N° CCLXVI. *June* 1744.

Dame *Sidney Sinclair* relict of Sir *John Dalrymple*, purſuer, againſt Sir *William Dalrymple*, defender.

1. *An executor has no right to graſs, not ſown that year the proprietor died, on grounds in his natural poſſeſſion, after his deceaſe.* 2. *Nor to corns ſown thereon after his death.*

SIR *John Dalrymple* made ſeveral deeds in favours of the purſuer, in one of which he diſponed to her the whole corns, cattle, horſe, nolt, *&c.* and all other moveables that ſhould happen to belong to him at the time of his death, which happened on the 24th *May* 1743, at which time, and for ſeveral years preceeding, he had in his natural poſſeſſion a conſiderable farm, lying about his manſion-houſe of *Cranſton*. On the day Sir *John* died, ſeveral ploughs were ſet to work to till up part of this farm; and the whole operation of tilling and ſowing it with barley, in conſequence of orders from Sir *John*, (as the purſuer alledged) was compleated the third day thereafter.

The purſuer, as executrix confirmed to her deceaſed huſband, upon her diſpoſition to the moveables, brought a proceſs againſt Sir *William*, heir to Sir *John*, to account for the ſaid crop of barley, which he cut down and reaped, and likewiſe for the graſs crop, which he alſo took poſſeſſion of.

In ſupport of this action, it was pled, That if the farm had been let to tenants, the purſuer, as executrix to Sir *John*, would have been intitled to the half of the rents payable for the crop and year 1743, in reſpect of the defunct's ſurviving the term of *Whitſunday*; becauſe, as *Dirleton* ſays, the lands are then fully laboured and ſown: That the law was more favourable

vourable to the executors of a liferenter or fiar who died in the natural poſſeſſion, and gives them a greater intereſt, *pro cura et cultura*, than what they would have had by the mere civil poſſeſſion held by a defunct, by means of his tenants, and that it would not be agreeable to the ſpirit or equity of the law, that the purſuer ſhould be put in a worſe condition, in reſpect of theſe lands, than if they had been poſſeſſed by tenants. In other caſes, the practice of this Court has been very different, and gone ſo much farther on the other ſide, as to give the executors, even of a liferenter dying before *Whitſunday*, the whole fruits of the ground in his or her natural poſſeſſion: And it is ſupported on this ſolid ground, that as it is lawful for a liferenter or fiar to poſſeſs any part of his lands he thinks fit, it would be harſh and abſurd to hold, that, upon his death, during the currency of a year, the ſucceeding fiar or heir may inſtantly enter to the poſſeſſion, and abruptly turn off all the goods or cattle which the defunct neceſſarily had as the ſtocking of that farm. To prevent this inconvenience, and to encourage the owners of the ground to occupy the ſame as farmers, the immemorial cuſtom has obtained, that this natural occupancy may even ſerve to prorogate the right of the liferenter's executors ſomewhat beyond the term of her natural life; that is, ſo as to intitle them to reap the whole fruits of the ground for that year in which ſhe died, and this, without paying any rent for the ſame, even for the terms within that year, ſubſequent to the death of the liferenter. It is likewiſe obſervable, that, by the practice of the Court, no diſtinction has been made betwixt the corn and the graſs-ground of which the total farm or poſſeſſion conſiſted; neither is there any juſt reaſon for making a diſtinction; for, as it would be a bad farm that had no graſs ſufficient at leaſt to maintain the labouring cattle, would it not be abſurd to maintain, that a liferenter or fiar, dying after *Whitſunday*, and ſuppoſing all the corns, as uſual, fully ſown, the executors ſhould be intitled to reap and bring in that crop of corn; and yet they ſhall be liable forthwith to carry off all the beaſts that were in the defunct's poſſeſſion, as the neceſſary ſtocking of that farm; and that theſe muſt not be allowed to take a pluck of graſs after the proprietor's breath goes out: For, ſo far it will go, the heir may drive them off the ground, and the relict or younger children muſt find paſture for them elſewhere?

In the next place, with reſpect to the barley crop, it is true, that in our law books, ſtreſs has been laid upon the ſowing of the lands, in order to give the executors of the liferentrix a title to the crop, ſuppoſing her to die before *Whitſunday*; ſo that the beginning of the operations of the ſpring, by tillage merely, ſhall not be ſufficient to give the liferenter a title to that year's crop of the poſſeſſion, unleſs the *cura et cultura* has gone ſo far as the ſowing of the land where there was to be any ſowing that ſeaſon; and therefore, on a liferenter's dying before *Whitſunday*, provided it be after the ſowing, her executors take the whole crop. But from this it does not follow, that, if the liferenter ſurvive *Whitſunday*, tho' he or ſhe die before actual ſowing, that the executor ſhall take nothing. The culture, ſo far compleated as the ſowing, is rewarded, as it were, with a diſpenſation from the neceſſity of ſurviving the legal term. But if the liferenter or proprietor ſhall actually ſurvive that term, there is no neceſſity for that circumſtance; for now, without actual ſowing, it muſt be true *quod annus eſt cœptus*, the year of the liferent is actually begun, for the half of the legal year is already elapſed, and the half of

the rents due by the tenants would neceſſarily go to the executor; and to put them in a worſe caſe, by reaſon of natural poſſeſſion, would be highly incongruous. See 14th *December* 1621, *MacMath. July* 25. 1671, Captain *Guthrie. Stair*, Tit. *Liferent infeft.* p. 9.

Anſwered for the defender, That, when a proprietor dies, his right dies with him. In countries where the rule obtains *quod mortuus ſaſit vivum*, the property devolves directly upon the heir; he is intitled directly to enter into poſſeſſion. With us more ſolemnity is required, *viz.* by precept and ſaſine. This compleats the real right in the heir, and that from the death of the anceſtor. 2*dly*, When an eſtate is taken by an heir or a purchaſer, every thing goes along with it which is *pars ſoli*. 3*dly*, As this rule was found to be rigorous, when applied to particular caſes, ſo it has been ſoftened both in our practice, and in that of *England*. A liferenter ought not to be diſcouraged from taking land into his own poſſeſſion; yet he runs this ſeen danger, that if he died when his corns were ready to be cut down, the ſame went to the proprietor. This has introduced the practice, that the repreſentatives of the liferenter ſhould have the benefit of the liferenter's induſtry, ſo far as to be allowed to reap the corns growing at the liferenter's death; and which was afterwards extended by analogy, for the benefit of younger children who are but ſcantily provided by our law, to give them the corns growing at the predeceſſor's death, tho' really and truly not moveable. 4*thly*, This right, introduced in favours of the repreſentatives of a liferenter, and of the executors of a proprietor, which is plainly debording from the principles of law, has never been extended further, either in our practice or in that of *England*, than to corns actually ſown and growing at the time of the liferenter's or proprietor's death. Nor could it well be extended further, if the rules of law are at all to be regarded; for, as the proprietor's right is at an end with his life, as well as that of the liferenter, no mortal can be intitled to throw ſeed into the ground, except in the right of, or by allowance of the preſent proprietor. After his right commences, ſeed thrown into the ground makes the crop as much his, as it were ſown twenty years after the predeceſſor's death. *Laſtly*, This exception has never been extended further, than to induſtrial fruits, which are ſown and reaped annually. With regard to plants which remained longer in the ground than a year, neither the induſtry nor the expence are ſo great, as to preponderate, in our imagination, the rule of law, and indeed of common ſenſe, That whatever is fixed to the land, muſt go along with the land.

Now, to apply theſe principles: There cannot be a doubt that the barley crop, which was not only ſown after Sir *John*'s death, muſt belong to the defender, but the ground actually laboured after his death in order to prepare it for ſeed. Neither is there any evidence, but rather the contrary, that the defunct intended this ground for barley; but ſuppoſing he had given ſuch orders, the rule is, *morte mandantis perit mandatum*; and as the defender is now infeft in the eſtate, his infeftment muſt be drawn back to the time of his father's death, to give him all the benefit he could have, had he been then inveſted.

In the next place, with reſpect to the graſs crop: The only thing that can admit of a doubt is, the few acres ſown with rye-graſs and clover the year before Sir *John*'s death, and whereof, it muſt be acknowledged, the firſt crop was reaped after Sir *John*'s death. And as to this it muſt be obſerved, That the giving of growing corns to the executor, is introduced by

by practice againſt principles; but this practice has never gone beyond growing corns, neither is there any reaſon from analogy for extending it to ſown graſs: For the rule is, that nothing growing upon the land goes to the executor, but what is produced annually by labour and cultivation; and were we to paſs over theſe bounds, there would be no reaſon to confine the executor's claim to biennial or triennial plants. As to the obſervation made for the purſuer, That ſhe ought not to be put in a worſe ſituation, than if the lands had been ſet to tenants; it was anſwered, That there was no manner of analogy betwixt that and the preſent caſe. The executor ſometimes gains, and ſometimes loſes by the defunct's having land in his natural poſſeſſion. If it be a graſs-farm, and moſtly in hay, the executor will draw little; but if it is wholly a corn-farm, and the corn all ſown by the defunct, the executor will have the whole benefit, and be intitled to much more than the half year's rent. And as to the argument, that the executors of a fiar or liferenter ſhould be allowed to continue the defunct's poſſeſſion till the common term of removing, that they may have an opportunity in the interim of diſpoſing of the ſtocking; it was anſwered, That this was pleading in the face of the common law and practice, as it was the heir's right, and not the executor's, to continue the predeceſſor's poſſeſſion. It is true, that the tenants of liferenters, by the 26th act, parl. 1491, are protected in their poſſeſſion till the next term of *Whitſunday*, they paying their rents to the fiar: But this privilege has never been extended, either by the law or practice, to the liferenter's taking up the natural poſſeſſion; which is clear from many authorities. See *lib.* 8. *De annuis legatis. Lib.* 25. *Prin. de uſuris. Bacon*'s Abridgment, p. 421. *Craig, Dieg.* 8. § 38. *Lib.* 2. *Dieg.* 9. § 13. Sir *Thomas Hope*'s Major Practics, *Voce* Liferenter. *Stair*, Title *Tacks*, p. 321. *in medio.*

The Lords found the defender, Sir William Dalrymple, *heir in the eſtate, had right to the whole graſs and hay the year libelled, it not being alledged, that any graſs-ſeeds were ſown upon the ground that year; and that the purſuer had not any right to the ſaid graſs or hay, or any part thereof: And found, That the purſuer had not right to any part of the barley crop ſown by her, the purſuer, upon the lands after* Sir John Dalrymple's *deceaſe; but that the defender is liable to make payment to the purſuer of the expence of the labour, and of the ſeed ſown on the grounds after her husband's death; and that the defender has right to the ſaid barley crop, with the burden of the ſaid expence of ſeed and labour.*

No CCLXVII. 19th *June* 1744.

Competition, *John Campbell* with the other creditors of Sir *James Campbell* of *Auchinbreck.*

An execution of inhibition need not expreſs, that it was executed at the headburgh of the juriſdiction where the debitor reſided.

THE ſaid *John Campbell*, being creditor to Sir *James*, inhibited him, and, in a ranking of his creditors, craved to be preferred to the debts contracted poſterior to the date of his inhibition. Objected for theſe creditors,

ditors, That the execution of the inhibition at the market-croſs of *Inverary* againſt the lieges, did not bear or expreſs that Sir *James*'s reſidence was within the ſhire of *Argyle*, but only that his whole eſtate lay there; and tho' it be true, that his reſidence is at his manſion-houſe of *Lochgair*, upon that eſtate, yet as this was not expreſſed in the execution, the ſame was null and void, and the inhibition of no uſe to the creditor.

Anſwered, That there is no law or ſtatute that preſcribes the preciſe form of executing inhibitions, but only for the regiſtration thereof for the more certain notice and publication to all the lieges; and tho' the form of execution at the market-croſs be ſtill neceſſary to be obſerved, it is the regiſtration which in reality makes the certain publication, by which every perſon may know the condition of the party inhibited; and, in this execution itſelf, every thing is done which the law or cuſtom requires, namely, that the inhibition is executed againſt the lieges at the market-croſs of the head-burgh where the inhibited perſon dwells. The obvious reaſon and uſe of which place of execution is, that it is preſumeable, a man's ordinary and moſt frequent dealings or commerce will be with perſons living in his neighbourhood, within the ſame ſhire or juriſdiction where he himſelf reſides; and that ſtrangers dealing with him, will naturally make ſuch enquiry at one or other of the debitor's neighbours; the neceſſity of which is in a great meaſure ſuperſeded by regiſtration: But yet, as to the form of ſuch executions, if the lieges in reality be inhibited at the market-croſs of the ſhire where the debitor lives, where the prohibition is addreſſed to perſons who are ſuppoſed to know the debitor, or that they moſt readily may come to have dealings with him, it is unneceſſary to tell thoſe people, that the debitor lives in the ſame ſhire or diſtrict with themſelves; for, if it be true that he lives there, which is notour in this caſe, the lieges are duly certified not to have any dealings with him; and if in fact the debitor does not live there, the party is not duly inhibited. In a word, if the inhibition is publiſhed at the market-croſs where the debitor reſides, there is no neceſſity that the execution ſhould expreſs it. And as there is no law preſcribing the form of the execution, the thing itſelf is ſettled by cuſtom, that the place at which the lieges ought to be inhibited to contract with the debitor, is the market-croſs of the head-burgh of the ſhire where the debitor reſides. See 8th *July* 1713, *Baillie*. 15th *January*, 1706, *Loch*. 14th *February* 1710.

Replied, That legal diligences, which muſt be executed conform to certain formalities, and at certain places, determined either by ſtatute or practice, cannot be available, unleſs the execution expreſs that the meſſenger has done and fulfilled all that the law enjoins, and that the formalities requiſite were obſerved and done at the appointed places; and if any thing is omitted to be expreſſed in the execution, it cannot be ſupplied by a proof by witneſſes, or what the inhibiter calls notoriety, which is no evidence of a fact in a court; for, if ſuch executions, and particularly of inhibitions, could be ſupplied, in ſo far as they are defective, by oral evidence, no body could be ſure of their property. It is not enough to execute inhibitions; they muſt likewiſe be regiſtrate for publication to the lieges; ſince it is only from that they can know with whom *in tuto* to contract, ſince they can only be put in *mala fide* from what appears in the regiſter. Now, it is obvious, that, upon inſpecting this execution in the record, for any thing that appeared from it, the execution was null; for, altho' a perſonal creditor might have known ſo much of his debitor, as to have heard that he had an eſtate in *Argyleſhire*, and might have known

that

that *Inverary* was the head-burgh of that county; it does not therefore follow, that he muſt have known that Sir *James*'s dwelling-houſe was in *Argyleſhire*, or that his reſidence for the time was there, or that this his reſidence did not ly within ſome regality, or other particular juriſdiction. This execution on record certified the creditor of none of theſe things; and if he is now only to be informed by evidence brought of the fact, then, to be ſure, there can be no reliance on the faith of the record, ſince parties may be endangered by a proof by witneſſes. And if the rule hold, That executions muſt ſtand or fall upon their own footing, without the aid of any foreign ſupport, it will import nothing tho' ſome creditors might have known that Sir *James* really reſided in that county, at the time of this execution; becauſe ſuch creditors, tho' they knew the fact, yet knew alſo, that the execution was null, as not expreſſing what the law requires. And whatever may be the caſe in ordinary executions of ſummonſes, executions of diligences, which the law has appointed to be regiſtrate for publication, muſt fully expreſs all that the law requires to be done. And with reſpect to the notoriety, it imports nothing whether it was known to all the creditors, or not, ſince notoriety cannot be underſtood to extend further than the vicinity; and perſonal creditors lending their money, cannot be ſuppoſed to have enquired where their debitor dwelt.

The Lords repelled the objection to the inhibition.

N° CCLXVIII. *June* 26. 1744.

James Douglas of *Hillſide* purſuer, againſt *Archibald Inglis* of *Auchindinnie*, and *John Rigby Inglis*, an infant, defenders.

1. *Minor*, an tenetur placitare, *&c?* 2. *Is the brocard a good defence againſt a declarator of non-entry, when it does not appear from the minor's predeceſſor's rights, that the purſuer is ſuperior?* 3. *Is the brocard, in ſuch a caſe a good defence againſt redemption?*

ANNO 1621, *John Symington* of that ilk, wadſet the lands of *Over-polmuckſhead* to *John Symington*.

In the year 1696, *John Inglis* writer to the ſignet, adjudged theſe lands from *John Symington*'s repreſentatives, whereby he carried right to the wadſet, and got into poſſeſſion. And in the 1711, *John Inglis* diſponed the ſame to his ſecond ſon *Patrick Inglis*, to be holden either of himſelf or his lawful ſuperiors; and, to that effect, the diſpoſition contained both a procuratory and precept. *Patrick Inglis*, being about to go to the *Weſt-Indies*, borrowed *L.* 550 *Sterling* from his brother *Archibald Inglis*; and, for his ſecurity, gave him an heretable bond on the wadſet lands; and to validate this heretable bond, *Patrick Inglis* was infeft upon the precept contained in his father's diſpoſition.

The purſuer, as in the right of ſuperiority of theſe lands, brought a reduction and improbation againſt Mr *Archibald Inglis*, and againſt the repreſentatives of *Patrick* his brother, of all rights in their perſons affecting the ſaid lands; and the ſummons further contained a declarator of non-entry, redemption, compt, reckoning, and payment.

The *firſt* defence pleaded for the ſon of *Patrick Inglis* was, That his father having died infeft, and in poſſeſſion of the lands in queſtion, that the defender his heir, being minor, *non tenetur placitare*, &c.

Anſwered for the purſuer, That while *Patrick* lived, his brother *Archibald* uplifted the rents in virtue of a factory from him; but, after his death, he inverted the poſſeſſion, and took up the ſame upon the title of his aſſignation in the heretable bond; ſo that the apparent heir of *Patrick* is not in poſſeſſion, directly or indirectly. The fact ſo ſtanding, he cannot have the benefit of this privilege, as it was only introduced in favours of minors, that they be not put out of their father's heritage, whereof he died in poſſeſſion; and in this caſe, the eſtate is affected with a debt which exhauſts the value, ſo that the minor can have no intereſt to plead this privilege. Beſides, he has not taken up his father's heritage, nor repreſents him as apparent heir. To illuſtrate this: Let us ſuppoſe, that a man dies bankrupt after his creditors have adjudged his eſtate for debts exceeding the value; ſurely the creditors would not be allowed to borrow the name of an infant heir, to protect themſelves againſt a preferable right, and keep themſelves in poſſeſſion, when the infant cannot, in all human probability, have any intereſt in the queſtion. Now, this is preciſely the preſent caſe; for the debt due to *Archibald* does exhauſt the value of the *hæreditas paterna*; and it is obvious, that the pupil, who has no other intereſt in the queſtion, is no other than a borrowed name to protect *Archibald* in his poſſeſſion. See *Stair*.

Replied for the minor, It appeared from his father's infeftment produced, that he died infeft in the property of the ſaid lands; ſo alſo he was truly in poſſeſſion at his death, the rents being uplifted by his brother *Archibald*, in virtue of a factory from him, which was all the poſſeſſion that poſſibly could be had of lands by a gentleman who reſided in a foreign country: And ſuppoſing the fact true, that *Archibald* has uplifted the rents ſince his brother's death, in conſequence of his heretable bond, ſtill ſuch poſſeſſion is as much the infant's, as it was his father's before his deceaſe. When a creditor poſſeſſes in virtue of a right in ſecurity, upon which he is accountable to the debitor, the creditor uplifts towards extinction of the debt, which is truly the poſſeſſion of the debitor, or his heir, who muſt in either caſe pay the debt: It is likewiſe entirely groundleſs to ſay, the ſucceſſion in this caſe was *obærata*, ſo as his heir can never find it his intereſt to take it up, ſeeing *Patrick* left ſeveral funds in *Jamaica*, as is properly vouched in proceſs; ſo that to compare this caſe to the ſucceſſion of a defunct who dies bankrupt, and whoſe eſtate is carried off by adjudications for ſums above the value, is plainly unjuſt. Here there is no bankruptcy, no diligence led againſt the lands which can carry them off from the heir, only a right in ſecurity, which muſt at all times be redeemable by him, and which he muſt redeem, were it above the value of the lands, before he can touch his father's other effects. In a word, the profit and loſs of the rents here is entirely the minor's; and it cannot poſſibly make any difference, with reſpect to his intereſt, whether they are uplifted by himſelf or his creditor.

In the *ſecond* place, the purſuer inſiſted, in the concluſion of his ſummons, with regard to the non-entry, and pleaded that the brocard *minor non tenetur*, &c. could not be a good defence againſt that claim, in ſo far as he did not ſeek to cut down the defender's right, but to make a demand, which all feudal property is ſubject to where the fee is empty and the

vaſſal

vaſſal not entered. This muſt ſurely have been the caſe, were this proceſs brought directly againſt the minor as heir to the purſuer's vaſſal. But this is not the caſe: *Patrick Inglis* died infeft in the lands holding of his father *John Inglis*; ſo that *Patrick* not being the purſuer's vaſſal, he neither does nor can bring a proceſs of non-entry againſt *Patrick*'s heir. His proceſs of non-entry is brought againſt *Archibald Inglis*, heir apparent to his father *John Inglis*; which *John* would have been the purſuer's vaſſal, had he thought proper to enter upon his adjudication above ſet forth. *Archibald* can have no defence againſt it in his own right, and he cannot be allowed to aſſume the name of the ſub-vaſſal and minor, to defend himſelf againſt this proceſs. When a proceſs of non-entry is brought againſt the vaſſal, ſuch a defence, hitherto, it is thought, has not been ſuſtained, that the proceſs cannot go on, becauſe the ſub-vaſſal is minor, and his intereſt may be hurt *per conſequentiam*.

3*tio*, Suppoſing the minor ſhould not be bound to produce in the reduction and improbation, nor be obliged to debate upon his father's rights to the lands in queſtion, yet the purſuer is certainly intitled to redeem the lands, as it clearly appears from the progreſs produced, that the defender's right to the lands can be no other than a wadſet; for this is truly not inſiſting to reduce or annul the defender's right, but inſiſting in an action which is quite conſiſtent with it. The brocard will not defend againſt a reduction *ob non ſolutum canonem*, nor againſt a proceſs of recognition; and as little ought it to defend againſt a declarator of redemption.

Anſwered to the purſuer's claim of non-entry, That the privilege *minor non tenetur*, does not bar actions which ariſe from the nature of the minor's right. If he found upon his father's infeftment, he muſt take it with its qualities; and therefore, if that infeftment, or its warrant, had acknowledged the purſuer as ſuperior of the lands, the minor could not object to any proceſs, brought at his inſtance, for the caſualties of his ſuperiority, becauſe his right, *ex facie*, was burdened with it, and he cannot plead againſt the nature of his own right. But ſurely there is no pretence from thence to argue, that when his father's infeftment bears *John Inglis* to be his ſuperior, it is competent to any third party, who derives no right from this ſuperior who granted the infeftment, to bring a proceſs, ſetting forth, that, above 120 years ago, one *Symington* was ſuperior, and that he the purſuer derives right from this *Symington*, and therefore the minor muſt take his charters from him, or elſe the lands muſt be found in non-entry. If this were to be allowed, it would be eaſy to evict from minors the property of their father's eſtate, as well as the ſuperiority. And as for the argument, that this declarator of non-entry is againſt *Archibald Inglis*, as apparent heir of *John Inglis*, and that it can be no objection to it, that the minor ſub-vaſſal's right may be hurt *per conſequentiam*; it was anſwered, That a declarator of non-entry could not take place againſt any perſon who does not appear to be heir of the purſuer's vaſſal, and that there was no documents produced to ſhow that ever *John Inglis* was the purſuer's vaſſal; but ſuppoſing it had been ſo, and that *Archibald* were to be conſidered as the apparent heir of the purſuer's vaſſal, ſtill the conſequential intereſt of the minor, 'tis believed, would bar a decreet of non-entry; the effect of which muſt be, to turn him out of poſſeſſion; and ſo it has been determined. See *November* 25. 1624, *Hamilton*. *June* 23. 1625, *Pringle*.

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As to the *third* point, *viz.* That the purſuer ſhould be allowed to inſiſt in his declarator of redemption; it was anſwered, That where the minor's father's right bears to be under reverſion, there, no doubt, it is true what the purſuer pleads, that a declarator of redemption is not inconſiſtent with the nature of the right, but may be proſecuted during the minority, as much as a declarator *ob non ſolutum canonem*, or a recognition where his father's right produced appears to be ſubject to ſuch caſualties; but where the minor's right appears to be abſolute and irredeemable, as in the preſent caſe, there a declarator of redemption is by no means conſiſtent with the nature of his right; and conſequently, the minor is protected againſt it during his minority. It may be true, that theſe lands were granted ſix-ſcore years ago under reverſion; and at the ſame time it is very poſſible, that the right of reverſion may have been diſcharged or extinguiſhed many different ways, which the minor cannot account for. The law preſumes him ignorant of paſt tranſactions, and unable to recover the documents by which they are to be inſtructed, and therefore protects him from ſuffering during his non-age.

The Lords ſuſtained the defence againſt the reduction, That minor non tenetur placitare; *and found, That it is no ſufficient defence againſt declarator of non-entry; and remitted to the Lord Ordinary to enquire into the purſuer's title to the ſuperiority of the lands, and whether all perſons having intereſt were properly ſiſted.*

No CCLXIX. *July* 5. 1744.

Executors creditors of Mr *Hugh Murray Kynynmound*, Advocate, againſt Mrs *Agnes Murray Kynynmound*, &c.

1. *Debts contracted by an heir of entail, in whoſe ſaſine the irritant and reſolutive clauſes were not* verbatim *repeated, will affect the eſtate.* 2. *Diſponee not liable to pay the debts of the diſponer, further than the value of the ſubjects diſponed, tho' he omit to confirm and inventar the ſame.*

ANNO 1710, Sir *Alexander Murray* execute an entail of his lands of *Melgund*, &c. in favours of himſelf in liferent, and to Sir *Alexander Murray* laſt deceaſed, his ſon, and the heirs male of his body in fee, *&c.* And by a deed, of the ſame date, relating to the entail, failing heirs of his own body, he ſubſtitute Mr *Hugh Murray* (then *Dalrymple*) his brother uterine, and the heirs of his body, *&c.* The diſpoſition contained ſtrict prohibitive, irritant, and reſolutive clauſes; and, in particular, it provided, that it ſhould not be in the power of Sir *Alexander* the firſt inſtitute, nor any others of the heirs of entail, to alienate or contract debt; declaring all ſuch deeds to be void and null; and, in the end thereof, there was a precept for infefting Sir *Alexander*, " with and under the expreſs proviſi-" ons, declarations, burdens, reſervations, faculties, reſtrictions, *&c.* a-" bove ſpecified, and no otherwiſe." A few days thereafter, ſaſine was taken thereon, without repeating the prohibitory and irritant clauſes *verbatim* in the inſtrument of ſaſine; but it recited the diſpoſition, and that ſaſine was granted under the expreſs " conditions, proviſions, declara-" tions, burdens, *&c.*" mentioned in the foreſaid bond and right of tailzie,

zie, and which are held as repeated *brevitatis cauſa*. *Anno* 1713, the maker of the entail died, whereupon his ſon Sir *Alexander* entered to the poſſeſſion of the eſtate, in virtue of the tailzie which was duely recorded in the year 1724.

Sir *Alexander* having got poſſeſſion, he contracted ſeveral debts, poſterior to the regiſtration: And, in the 1736, having no hopes of iſſue of his own body, he execute a diſpoſition in favours of Mr *Hugh Murray*, of all his ſubjects heretable and moveable, which ſhould belong to him at his death, other than thoſe which ſhould re ate to the entailed eſtate, burdened with the diſponer's debts.

Soon after the date of this diſpoſition, Sir *Alexander* died, whereupon Mr *Hugh Murray* compleated his titles to the eſtate, by ſerving himſelf heir of tailzie, under the ſeveral prohibitory, irritant, and reſolutive clauſes in the original entail; and, in conſequence of the diſpoſition laſt mentioned, he intromitted with the whole of Sir *Alexander Murray*'s effects, without confirmation, or making up any inventary, from which the extent of theſe effects could be made appear. He likewiſe paid ſeveral of his perſonal debts, to ſome of which he took diſcharges, and to others aſſignations. Mr *Murray* having died likewiſe, his creditors confirmed ſome of thoſe debts contracted by Sir *Alexander*, and paid by Mr *Murray*; and brought an action againſt the defender, his daughter, heir of entail, to have it found and declared, that the ſaid eſtate is affectable for payment of thoſe debts.

The defences were, 1*mo*, That the eſtate was not at all affectable for the late Sir *Alexander Murray*'s debts, the right in him being of a qualified nature, which no creditor of his could carry, otherwiſe than with the burden of the quality with which it was originally affected.

2*do*, Suppoſing Sir *Alexander*'s debts were chargeable on the tailzied eſtate, by Mr *Hugh Murray*'s accepting the foreſaid general diſpoſition, and intermeddling with the effects without inventary, the whole debts of Sir *Alexander* became thereby extinct.

Anſwered for the purſuers, to the firſt defence, That Sir *Alexander Murray* had neglected to engroſs *verbatim* in his ſaſine the prohibitory, irritant, and reſolutive clauſes in the tailzie, contenting himſelf with a general reference thereto, which was contrary to the expreſs directions " of the ſtatute 1685; which provides, That only ſuch tailzies ſhall be " allowed, in which the irritant and reſolutive clauſes are inſert in the " procuratories of reſignation, charters, precepts, and inſtruments of " ſaſine. And that if the ſaid proviſions ſhall not be repeated in the " rights and conveyances, whereby any of the heirs of tailzie ſhall bruik " and enjoy the tailzied eſtate, the ſaid omiſſion ſhall import a contra- " vention of the irritant and reſolutive clauſes, againſt the perſon and " his heirs, who ſhall omit to inſert the ſame; whereby the ſaid eſtate " ſhall *ipſo facto* fall and accreſce to the next heir of tailzie, but ſhall not " militate againſt creditors, and other ſingular ſucceſſors, *&c.*"

In terms of which clauſe, it is abſolutely requiſite to the very being and original conſtitution of any entail, that ſuch clauſes be inſerted in all and each of the procuratories of reſignation, charters, precepts, and inſtruments of ſaſine. That the intention of the law was manifeſtly to give force only to ſuch entails, wherein the ſtatute was ſtrictly obſerved, and to ſecure the intereſt of creditors againſt all tailzies which were not conſtituted in the preciſe form and manner therein preſcribed; and the

proviſo in the act does plainly relate to the original conſtitution of the entail, whether in the perſon of the diſponer, if reſignation is made in his favours, or in the perſon of the diſponee, or heir inſtitute. Further, if the former practice of extending the precepts on a paper a-part were ſtill practiſed, it would have been a good objection againſt Sir *Alexander*'s precept, that it did not contain the ſaid clauſes *verbatim*, in terms of the above act: But the purſuers have no occaſion to argue the point ſo high; becauſe, in every view, it muſt be apparent, that at any rate theſe clauſes behoved to be repeated, not only in the title-deed, but alſo in the inſtrument of ſaſine; which not having been obſerved by Sir *Alexander Murray*, this entail cannot be allowed to the prejudice of creditors, whatever effect it might have had towards forfeiting Sir *Alexander*'s right to the eſtate, had that been quarrelled. And it is impoſſible to plead with any colour of argument, that a general reference in the inſtrument of ſaſine to the irritant clauſes, as contained in a ſeparate deed, is the inſerting of theſe clauſes in the ſaſine itſelf; becauſe, the queſtion at preſent is not, What the legiſlature ought to have deemed a ſufficient interpellation to creditors contracting with the perſon who ſtood ſo infeft, in which there may be various opinions? but ſingly, What is the direction of the ſtatute in this particular? And as the law has *in terminis* required, that theſe clauſes ſhould be inſerted, not only in the charter and procuratory of reſignation, but alſo in the inſtrument of ſaſine; unleſs the defender can ſay, that theſe were ſo inſerted, ſhe can ſay nothing to the purpoſe.

To the ſecond defence it was anſwered, That the general diſpoſition by Sir *Alexander* to Mr *Hugh Murray*, and his acceptance thereof, could not poſſibly infer an univerſal paſſive title: He was not made thereby perſonally liable for all Sir *Alexander*'s debts, tho' the right itſelf was burdened therewith. No doubt Mr *Murray* was bound to apply the proceeds thereof, towards payment *pro tanto* of Sir *Alexander*'s debts; and in this caſe, the creditors are able to ſhow that he actually paid much more of Sir *Alexander*'s debts than he received; and in ſo far Mr *Murray* became a proper creditor to Sir *Alexander*; and in that view, no doubt, took conveyances and aſſignations from moſt of the creditors, inſtead of diſcharges; and it is likewiſe upon the ſuppoſition the fact is ſo, that the purſuers, as creditors to Mr *Murray*, have brought this action of recourſe againſt the tailzied eſtate. See 28th *July*, Viſcount *Garnock*.

Replied for the defender, That tho' the act 1685 required the ſeveral proviſions ſhould be repeated in the inveſtiture of every heir who bruiks in virtue of an entail, yet it was neither neceſſary, by the words of the act, nor agreeable to the practice which has followed upon it, to inſert *verbatim* the ſeveral proviſions in every part of each inveſtiture. If theſe clauſes are once inſert *verbatim* in one part of the inveſtiture, 'tis ſufficient if the other parts of the inveſtiture contain a reference in general to the conditions and irritancies, fully recited in the preceeding part. Thus, if they are *verbatim* engroſſed in the procuratory of reſignation, it is ſufficient, if in the charter, precept, or inſtrument of ſaſine, they are brought in by way of general reference: And when they are inſert in that manner, it is certainly no ſtretch to ſay, that they are inſert in the charter, precept, or inſtrument, altho' poſſibly they are not fully recited. And that this is the true ſenſe and meaning of the act, is evident

vident from the laſt clauſe thereof, which provides, "That the omiſ-"ſion to inſert theſe clauſes, ſhall import a contravention againſt the "heir, *&c.*" If the act were to be underſtood in the ſenſe of the creditors purſuers, the conſequence would be, at one blow to ſtrike off the greateſt part of the tailzies in *Scotland*, ſince 'its well known that the uſual practice is to engroſs them *ad longum* in the diſpoſitive clauſe, and to inſert them in the procuratory and precept, only by a general reference. And it is obſervable, that if, by the words of the act, it is abſolutely neceſſary that the clauſes ſhould be inſert *verbatim* in the inſtrument of ſaſine, by the ſame words it is equally neceſſary, that they ſhould likewiſe be inſert *verbatim* in the procuratory and precept.

Replied to the anſwer to the ſecond defence, That the diſpoſition by Sir *Alexander* to Mr *Murray*, was burdened with the granter's debts, conſequently Mr *Murray*'s acceptance thereof muſt ſubject him thereto. The acceptanee of a diſpoſition, with the burden of the granter's debts, is a known common paſſive title; and has the ſame effect as if the accepter were heir ſerved to him. The only expedient that the receiver of ſuch a diſpoſition has to relieve himſelf of the univerſal paſſive title, and to ſecure his being only liable to the extent of the ſubjects conveyed, intromitted with by him, is to confirm himſelf executor creditor, upon the warrandice of the diſpoſition expreſt or implied. Such management exeems the diſponee from all ſuſpicion of fraud, and affords to the creditors of the defunct an eaſy charge againſt him, to operate their payment to the extent of his intromiſſions; but where he omits to confirm, and inventary the ſubjects intromitted with by him, he is underſtood to take his hazard of the effects anſwering the debts; ſo that if he ſhould not make good ſo much of the effects as would anſwer the debt, he muſt, notwithſtanding, ſatisfy the whole. And it is moſt juſt it ſhould be ſo, ſince he did not follow the legal and ordinary precaution, by confirming the ſubjects, and thereby ſave himſelf from being further liable than to the extent, and furniſh the creditors with a rule of charge againſt him, on the inventaries of the ſame. Now, in the preſent caſe, Mr *Murray*, without confirming, or inventaring the effects, intermeddled with the ſame *per averſionem*, conſequently he became univerſally liable to the creditors of Sir *Alexander Murray*; and the debts paid by him, in conſequence of his being ſo liable, became for ever extinct. See the act 12. Parl. 1617, touching the long preſcription, and the caſe of the Lady *Little Ceſsnock* 1718; 2d *February* 1728, Lord *Strathnaver*.

The Lords found, That Sir Alexander Murray *not having repeated the irritant, prohibitory, and reſolutive clauſes of the entail in the ſaſine, upon which he bruiked the eſtate, otherwiſe than by a general reference, the debts contracted by him may be charged upon the entailed eſtate.* And further found, *That Mr* Hugh Murray, *by the conception of the diſpoſition founded on, granted to him by Sir* Alexander Murray, *of his effects, was not obliged to pay the debts of the granter, beyond the value of the ſubjects diſponed.*

N°. CCLXX.

N°. CCLXX. 6th *July* 1744.

Daniel M'Donald, Superviſor of Exciſe in *Montroſe*, Charger, contra *Robert Hutcheſon* Merchant there, Suſpender.

Upon whoſe risk the hazard of a ſubject ſhould ly after the ſale.

ON the 7th *June* 1743, the charger expoſed a quantity of ſpirits to ſale, which was purchaſed by the ſuſpender, as the higheſt offerer at the roup, who immediately gave his bill for the price. Next day when he demanded delivery, the charger told him, that the cuſtom-houſe of *Montroſe* had been broken open the night before, and the ſpirits, which was lodged there, carried off; and that after the ſale, he did not conſider himſelf as anſwerable therefor. *Hutcheſon*, being charged for payment of the bill, ſuſpended, and pled, that as the ſame was granted for the price of the ſpirits which was not delivered to him, it would be againſt the principles of equity to make him liable for the price, when the thing ſold had periſhed by no fault of his, or any delay on his part in demanding delivery; for as it was paſt cuſtom-houſe hours, on the evening of the 7th *June*, when the ſale was, he could not have got out the ſpirits that night. That whoever brings his action on a mutual contract, muſt lay it on this, that he has fulfilled his part; and as a contract of ſale is a mutual contract, and a contract *bona fide*, there is nothing in the law of *Scotland* to difference it from the general rule of equity, which is received in all mutual contracts. When the ſeller ſues for the price, he ought to ſhow that the ſubject ſold is delivered; and if it cannot be delivered, the obligation for payment of the price is diſſolved. If indeed the ſubject ſold periſhes, without the fault of either party, which ſometimes may be the caſe, then each ſhould bear his own loſs; the ſeller has no action for the price, and the buyer poſſibly may have none for damages. It is true, the Doctors of the civil law have pretty generally laid it down for a rule, That, by the ſale, the riſk of the ſubject ſold is transferred from the ſeller to the buyer; and that if it periſhes before delivery, it periſhes to the buyer, tho' at the ſame time ſome of the greateſt authorities are of a contrary opinion; in particular, *Cujacius ad l.* 33. *in locat.* But whatever be the civil law in this matter, it is believed, it was never received to be the law of this country, that, by the ſale alone, the riſk is transferred from the ſeller to the buyer, as is obſerved by Lord *Stair*, *lib.* 1. tit. 14. §7.

2*dly*, Suppoſe the general rule ſtood ſo, yet as the time of ſale was after the cuſtom-houſe hours, when the ſeller could not have made tradition till the next day, the interveening riſk in this caſe ought not to ly on the buyer.

Anſwered for the charger, That the riſk of the thing ſold lay upon the buyer, after the ſale was compleated and the price paid; or, which is the ſame thing, a bill granted therefor. Neither was there any ground in equity, upon which the ſuſpender could be relieved in this caſe, as the ſpirits were ready inſtantly to be delivered upon the ſale; and were it neceſſary, the charger could prove, that the ſuſpender could have got the ſpirits out of the cuſtom-houſe, and a permit with them, the moment af-

ter

ter the ſale was compleated; and that his delaying to take them away, was only for his own conveniency, in reſpect he had purchaſed the ſpirits for another (as he gave out) who was not in *Montroſe* at the time.

In the next place, In the courſe of this proceſs, the ſuſpender referred the onerous cauſe of granting the bill to the charger's oath. In conſequence whereof, he deponed, that it was granted for the ſaids ſpirits, and that he had no further riſk of them, than the hour he received *Hutcheſon*'s bill; and that he told the ſuſpender, immediately after the ſale, he would have no further trouble of them; and that next day when he demanded payment of the bill from the ſuſpender, he ſaid he would pay it in a little time. From all which it is plain, the bargain was compleated the time of the ſale, and the riſk transferred, whereby the charger had no further concern with what afterwards happened; and that the breaking open the cuſtom-houſe, and carrying off the ſpirits by thieves, was an accident which cannot affect the ſuſpender, and afford him no ſufficient ground to be freed from payment of the price.

The Lords found the letters orderly proceeded.

N°. CCLXXI. *July* 7. 1744.

Chriſtian Beg Purſuer, *contra* Mr *Thomas Rig* of *Morton*, Defender.

If an execution is objected to as null, can it be ſupplied by producing another after the proceſs is called, given out, and defences returned?

THE purſuer having brought a proceſs againſt the defender, the ſummons was called in the Outer-houſe, the 9th *June* 1743, and given out on the 12th, with an execution ſubſcribed by a meſſenger, but not by any witneſſes; and upon the 20th, was returned with defences, wrote upon the back of the execution, objecting the nullity thereof, as wanting witneſſes, in terms of the act 1686, which declares ſuch executions void and null, and are not ſupplyable *ex poſt facto*, by the act 1681. This proceſs was inrolled the 30th *June*, upon the ſaid return; and being called before the Ordinary, and the ſame defence inſiſted on, the purſuer produced a new execution, ſigned both by a meſſenger, and witneſſes, with an inſtrument of proteſt, four days after the return, offering the proceſs to be given out a ſecond time, with the new execution, which was refuſed to be taken out, in regard ſigned defences were made to the firſt out-giving.

Upon this debate the Lord Ordinary repelled the defences, and the Lords adhered.

N°. CCLXXII. *July* 20. 1744.

Competition betwixt *David Liddel* and *Andrew Dick*, and his Creditors.

Homologation, if good in a competition with creditors?

THE ſaid *David Liddel* being creditor to *Andrew Dick* by an heretable bond, in order the more eaſily to obtain payment of his debt, purchaſed an aſſignation to a minute of ſale of *Dick*'s lands, from one *Forreſter*, whereby *Liddel* became debitor to *Dick* in the price of the lands. *Dick*'s creditors having uſed diligence againſt him by hornings, inhibitions, arreſtments, *Liddel* called them all in a multiple-poinding; whereupon a competition having enſued, *Dick*'s creditors objected to *Liddel*'s heretable bond, that one of the ſubſcribing witneſſes to it was not deſigned in the body of the bond, conſequently it was null by the act 1681; the clauſe requiring the ſolemnities of the act, running in the following terms: In witneſs whereof, I have ſubſcribed this, and the two preceeding pages, at *Clachan* of *Fintry*, written by *William Wiſhart*, notary at the *Clachan* of *Fintry*, before theſe witneſſes the ſaid *William Wiſhart*, and *Thomas Wiſhart*.

Anſwered: Such nullities have been found ſuppliable by acts of homologation; and here a ſtrong one occurred, *viz.* an aſſignation to the maills and duties of the lands granted by *Dick* to *Liddel*, wherein the heretable bond is fully recited, and of even date with it, and which was written by the ſame writer, and had the ſame witneſſes, and properly ought to have been a part of it; and here *Thomas Wiſhart* is deſigned *ſon to William Wiſhart notary in Fintry*. If indeed *Dick* had been brought under any diſability by his creditors, betwixt the date of the heretable bond, and the aſſignation to the maills and duties, there might have been ground to have made a diſtinction betwixt the debitor and his creditors, with reſpect to the effect of the nullity and act of homologation; but as they were both executed *unico contextu*, there is no room for ſuch a diſtinction. See 17th *February* 1715, *Sinclair*; 29th *February* 1732, *Suddy*; 21ſt *January* 1735, *Blackwood*.

The Lords found it competent to the creditors, competing with the purſuer for the price, to object the nullity.

N°. CCLXXIII. *July* 26. 1744.

Competition, Lady *Auchinbreck* with her Husband's Creditors.

A bond of proviſion by a husband to a wife, at a time when inſolvent, if good?

IN the ranking of the creditors of Sir *James Campbell* of *Auchinbreck*, Sir *James*'s Lady produced a bond of proviſion, granted by her huſband to her, on which infeftment had followed, which proceeded on the narrative

narrative, that ſhe had not been ſecured in a competent jointure, as had been communed and agreed upon betwixt them before the marriage; and therefore, in implement thereof, he diſponed to her an annuity of *L.* 100 *Sterling* yearly, free of all burdens; and likewiſe the liferent of certain lands therein mentioned, extending to about 400 merks *Scots* of yearly rent, *proviſo*, that in caſe ſhe married after Sir *James*'s deceaſe, ſhe ſhould reſtrict the ſame to *L.* 50 *Sterling* yearly.

Objected for the creditors, That this intereſt could be ſuſtained to no extent, in reſpect Sir *James*, being abſolutely inſolvent, could not make a proviſion for his wife to the prejudice of his creditors; and if it could be ſuſtained at all, it could only be to a very moderate extent; more eſpecially as ſhe brought no tocher, and that Sir *James* was inſolvent at the time of granting the bond, and owing debts far exceeding the value of his eſtate, for a conſiderable part of which infeftments were taken, and others ready to be taken.

Anſwered: The proviſion muſt ſtand to the full extent, as it was not gratuitous but onerous. That it proceeded on an antecedent paction, not executed in writing. That in conſidering the extent of a proviſion, the huſband's rank and quality, as well as his circumſtances, fell to be conſidered, and that Sir *James* was a man of conſiderable figure and fortune. That if this proviſion had been made in a contract of marriage, it would have been good to the full extent; and there was no difference betwixt an ante-nuptial and poſt-nuptial contract, or bond of proviſion granted by the huſband to the wife after marriage, and the proviſion was ſo far from being large, that it was very moderate.

Replied: There was a very great difference betwixt contracts executed before or after marriage, and voluntary bonds of proviſion by a huſband to a wife, who contracts nothing on her part, nor even agrees to accept thereof in lieu of her legal proviſion, as in this caſe. For, in the firſt caſe, the proviſion muſt ſtand, where no particular qualification of fraud can be alledged. In contracts poſt-nuptial, where the wife clubs a tocher, theſe fall alſo to be ſuſtained as onerous, unleſs where there is a notable exception, a proviſion made to the wife, whereby her huſband's juſt creditors may be damnified. But the third caſe, which is the preſent, is different from both. It is true, that, in ſome ſenſe, this bond may be conſidered as onerous, in reſpect of the huſband's obligation *jure naturæ* to aliment his wife; and in this light the huſband's circumſtances, and extent of his fortune, are to be conſidered more than his rank and quality. A huſband, whatever be his rank and quality in the world, is bound to provide for his wife's aliment: That obligation is a debt upon him, and he is bound to it, whether he have any ſubſtance or not; but the quantity muſt vary according to his circumſtances. And if the caſe be as here, that the huſband was abſolutely inſolvent, tho' he was bound to aliment his wife, the obligation is of a very different extent from the former; and therefore this bond ought either to be reduced *in totum*, or reſtricted to a moderate aliment.

The Lords reſtricted the Lady's liferent bond of proviſion, and infeftment, to L. 50 Sterling yearly, and that in full of all ſhe can claim by the ſaid bond: And declared, that the ſaid L. 50 ſhall not affect, or come in competition with creditors, whoſe debts were made real by infeftment, or ſecured by inhibition, before the date of the ſaid bond of proviſion.

No. CCLXXIV. *July* 28. 1744.

Andrew Edmonſton of *Ednem*, Purſuer, contra *Archibald* and *James Bryſons*, Defenders.

A promiſe made by a tenant, who poſſeſſes by tacit relocation, to remove at the next enſuing term, while it was competent to the maſter to uſe a formal warning, and not reſiled from till the term-day, when no warning could be uſed, is binding upon the tenant.

ARCHIBALD BRYSON poſſeſſed the farm of *Boonerton* of *Ednem* ſeveral years, under the purſuer's father, by a verbal agreement; and after the late *Ednem*'s deceaſe, the purſuer, as apparent heir to his father, allowed the tenant to take in *James Bryſon* his ſon, as ſub-tenant in part of the farm.

In *February* and *March* 1744, the purſuer had ſeveral communings with them anent their giving more rent for the farm, which they refuſed; whereupon, as the time of warning was drawing near, he aſked them, If it would be neceſſary for him to uſe a formal warning? to which *Archibald*, in the preſence and hearing of his ſon, told the purſuer, that they would take no advantage of him, if he ſhould not think fit to warn them away; and that it was not neceſſary for him to uſe any warning, and that they would remove at *Whitſunday* next. When the term came, they refuſed to remove, which obliged the purſuer to raiſe a proceſs of removing, and inſiſt, That as the *Bryſons* had come under an expreſs promiſe to the purſuer, to remove at *Whitſunday* laſt, which he offered to prove by their oath, they were bound thereby to remove accordingly, without any legal warning againſt them; and that it was not in their power to reſile juſt upon the term-day, *rebus non integris*.

Pleaded for the defenders, That the purſuer being not yet infeft in the lands, could not inſiſt in a removing. *2do*, That a verbal promiſe to remove was not binding, but that parties might reſile till it was put in writing. *3tio*, That as the purſuer was not bound to let them go at *Whitſunday*, by accepting of a renunciation from them, it would be unequal to find them bound to remove while the purſuer was looſe. *4to*, A ſeparate defence was made for *James Bryſon*, that tho' he was preſent when his father made the promiſe, yet he gave no expreſs conſent thereto.

Anſwered to the firſt defence, That it was not competent to object to the purſuer's title, as the defenders acknowledged he was apparent heir to his father, from whom they received their poſſeſſion; and that they had paid rent to him as ſuch, which was ſuch an acknowledgment of his right, as barred them from objecting thereto; neither was there any place for this objection here, ſeeing he was not inſiſting to remove the defenders, in conſequence of any real right in the lands, but merely upon the expreſs promiſe made by them to him. There could be no doubt the purſuer was intitled to continue his father's poſſeſſion, and had a full right to his eſtate, barring, that his title wanted a form of the law to compleat it; and therefore he was certainly intitled to aſk ſuch a promiſe, and inſiſt that the defenders having given it, were bound thereby. To the ſecond defence, it was *anſwered*, That it was a maxim in our law,

law, that promiſes were binding upon the party-promiſer, according to the different ſubjects to which they are interpoſed. This being the general rule, the purſuer can ſee no reaſon why it ſhould not apply to a promiſe by a tenant to remove from the poſſeſſion of his farm. There are ſome caſes indeed, which the law thinks of ſuch moment as not to truſt to naked words, ſuch as the conveyance of the property of heretable ſubjects; and therefore, by conſtant practice, have required writ as a neceſſary ſolemnity to their perfection; but that exception will not apply to a tenant's removing from a farm, no law having required writ to be neceſſary in that caſe, it being only a temporary poſſeſſion, and not of ſuch conſequence as the tranſmiſſion of heretable rights. Theſe principles apply ſtrongly to the caſe in hand, where there was no written tack betwixt the parties, nor ſo much as a verbal one, but the poſſeſſion only continued by tacit relocation; and any doubt that can ariſe upon a queſtion of this kind, muſt only be where there is a written tack betwixt the parties; as it may be there argued, that a tack conſtitute by writing ought only to be taken away by writing, or a formal warning; *unumquodque eodem modo diſſolvitur*, &c. And by this rule, a verbal promiſe to remove ought to be ſufficient, where the tack was only verbal. See *Craig, lib.* 2. *Dieg.* 9. § 11.

The ſtatute which introduces the form of warning, never intended to take from the parties the power of diſpenſing with theſe legal formalities. But ſuppoſing, for argument's ſake, the defenders could have reſiled, ſtill they ought to have done it *rebus integris*, ſo as to leave each party, at the time of reſiling, in the ſame ſituation in which they were when the agreement was made; but whenever the caſe is otherwiſe, and one party has been lulled aſleep by the other's promiſes, till it is out of his power to do what he might otherwiſe have done, to procure a legal remedy in place of a voluntary one, that is a kind of fraud which no law will ever favour; and here the defenders did not ſhow the leaſt repentance of their promiſe till the term-day, when it was too late for the purſuer to uſe a legal warning.

To the third defence it was anſwered, That the purſuer always acknowledged, that he accepted of the renunciation of their farm, which bound him to the defenders. See 24th *January* 1734, *Carlyle*.

With reſpect to the laſt defence, it was offered to be proved by the defenders oaths, That *James Bryſon* was preſent with his father at the communings with the purſuer; and that he heard his father promiſe to remove, without objecting thereto.

Laſtly, There was no need of making any agreement with *James* the ſon, becauſe he was only ſub-tenant to his father; therefore it was unneceſſary to uſe any warning againſt him, becauſe a warning or agreement with the father was ſufficient againſt the ſon, his right depending on his father's, the principal tenant.

The Lords remitted to the Lord Ordinary to take the defenders oaths.

ERRATA.

No. I. page 5. line 1. for *is* read *are*. No. II. p. 28. l. 19. after the word *adjection* read *of*. No. XIII. p. 30. l. 14. for *granter* read *grantee*. No. XLI. p. 71. l 23. for *th ir* read *there*. No. L. p. 85. l 1. in the decision for *their* read *there*. No. LI. p. 87 l. 21. for *elusary* read *elusory*. No. LXII. p 106 l. 26. dele *not*. No. LXIII. p. 107. l. 5. from the foot of the page, after *legal* read *situation* for *tion*; and l. 10. for *indicious* read *judicious*. No. LXXIX. p. 127. l. 22. from the beginning of the decision, for *leased* read *lesed*. No. CII. p. 158. l. 4. for *propriety* read *property*. No CXXV. p. 202. l. 1. for *defender* read *pursuer*. No. CXXXII. p. 219. l. 2. for *she and curators* read *she and her curators*. No. CXXXV. p. 227. l. 30. for *genious* read *genius*. No. CXLVI. p. 306. l. 4. for *stent* read *stent*. No. CLXXXVI. p. 306. l. 4. from the foot of the page, for *dos* read *does* No. CXCVIII. p. 327. l. 20. for *it is* read *its*. No. CCVII. p. 341 l. 17. for *heredis* read *heredes*. No. CCXLVI. p. 393. l. 5. for *at our* read *attour*. P. 395. of the same decision, l. 3. for *ease* read *case*; and in l. 7. for *cases* read *eases*. No. CCLIII. p. 404. l. 3. *comma* after the word *matter*. No. CCLXIII. p. 419. l. 22. for *here* read *there*.

ERRORS *in numbering the* DECISIONS.

No. V. repeated. For No. XXVI. read XXIV. p. 45. No. XXX. repeated, p. 52-54. No. CIII repeated, p. 156-159. No. CIV. repeated, p. 160-162. For No. CCXLVII. read CCLVII. p. 410.

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FORFEITURE. It is no miſnomer in an act of attainder for high treaſon, that the perſon was attainted under the ſirname of Wakinſhaw, inſtead of Walkinſhaw; and that he was deſigned of Scotſtown, tho' not infeft in any lands at the date of the attainder. No. 30. *Walkinſhaw* contra *his Majeſty's Advocate*, *July* 8. 1736.

FORGERY. The act 1701 anent perſonal liberty, does not comprehend proceſſes for forgery. No 55. *His Majeſty's Advocate* contra *Rennie*, *February* 24 1737.

FORUM COMPETENS. Teſtament of a merchant, within which diſtrict muſt it be confirmed? *See* No 63. *Creditors of Tran* contra *Hamilton*, *June* 29. 1737.

The teſtament of a deceaſed lawyer falls to be confirmed within the bounds where his principal dwelling-houſe on his eſtate in the country lies, where he reſided in the vacation, and not at Edinburgh, tho' he had a houſe there, in which he reſided in ſeſſion time, and where he died. No 194. *Competition Chalmers with Blair*, *June* 17. 1742.

G

GENERAL DISCHARGE. By a ſon to his father, of portion natural, and of all he could aſk thro' his father's deceaſe, upon whatever cauſe or occaſion, does not cut off the ſon's right of ſucceſſion to his ſhare of the dead's part. No 250, *Competition Anderſon with Anderſons*, *November* 22. 1743.

H

HEIR APPARENT. Rents of an eſtate unuplifted belong to the executors of an apparent heir, who had likewiſe a perſonal right to the land. and not to the next ſubſtitute in the ſettlement, who ſucceeded thereto after the apparent heir's deceaſe. No 247. *Executors of Campbell* contra *Campbell*, *July* — 1743.

HEIR PORTIONER. The principal dwelling-houſe, &c. belongs to the eldeſt heir-portioner, without any recompenſe to the other heirs-portioners. No 226. *Peedie* contra *Peedies*, *July* 2. 1743.

HEIR CUM BENEFICIO. Priority of a citation, or decreet againſt an heir *cum beneficio*, decerning him to pay *ſecundum vires inventarii*, gives no preference amongſt perſonal creditors of a defunct. No 104. *Competition Lawſon with Udney*, *November* 28. 1738.

HERETABLE AND MOVEABLE. The annualrent which falls due the firſt term after a husband's deceaſe, upon an heretable bond provided to him and his wife in conjunct fee and liferent, and to the longeſt liver, belongs to her and not to the husband's executor. No 81. *Carruthers* contra *Barclay*, *January* 11. 1738.

Bond payable the firſt term after the granter's deceaſe, with annualrents during the not payment, and a clauſe for infeftment to have preſent effect, is heretable *a principio*, tho' the creditor die before the term. No 106. *Competition Menzies with Menzies*, *December* 8. 1738.

A debtor having diſponed his eſtate to truſtees for behoof of his creditors, upon which infeftment followed; and one of the creditors having aſſigned a perſonal bond to the truſtees, on which they led an adjudication, and ſold part of the ſubjects in the creditor's lifetime: It was *found*, That the bond was rendered heretable, and remained ſo at the creditor's death, except in ſo far as he was intitled to draw of the ſums therein contained, out of ſuch of the ſubjects as were ſold by the truſtees before his death. No 121. *Competition Murray with Rochead*, *November* 6. 1739.

Found, That the annualrents due at the Candlemas preceeding a creditor's death, belonged to his executors, of ſuch heretable bonds ſecured by infeftment, whereof the annualrents were taken, payable at two terms in the year, *viz.* Candlemas and Lammas. *Ibid.*

The proprietor of a graſs-room having outlived Martinmas, his executors were *found* intitled to the whole year's rent thereof, payable at the Martinmas preceeding, and Whitſunday ſubſequent to his deceaſe. No 165. *Competition Pringle with Pringle*, *June* 4. 1741.

An executor has no right to graſs not ſown that year the proprietor died, on grounds in his natural poſſeſſion, nor to corns ſown thereon after his death. No 266. *Sinclair* contra *Dalrymple*, *June* 1744.

HERETAGE AND CONQUEST. *Found*, That an heretable bond upon which no infeftment had followed, belongs to the eldeſt brother. No 106. *Competition Menzies with Menzies*, *December* 8. 1738.

Teinds fall to the heir of line, and not to the heir of conqueſt. No 44. *Greenock* contra *Greenock*, *December* 16. 1736.

HOLOGRAPH. *See* Writ privileged. No 137.

HOMOLOGATION. In a reduction upon the head of death-bed, of an obligement to diſpone a houſe, the defunct's eldeſt ſon being the writer and witneſs to the deed, was *found* to import his approbation thereof. No 26. *Brown* contra *Muir*, *June* 17. 1736.

Homologation of a deed is relevant to ſupport the ſame, tho' liable to the objection, that one of the witneſſes therein was only deſigned

Eſquire.

Eſquire. No 38. *Hepburn* contra *Hepburn*, *December* 1. 1736.

One may accede by facts and deeds to a ſubmiſſion betwixt others, reſpecting land-rights, without ſigning the ſame. No 112. *Brown* contra *Gardner*, *January* 10. 1739.

An heretor's ſon being preſent for his father at the viſitation of a manſe, and not objecting to the presbytery's decreet, impoſing a ſtent on the heretors, *Found* to make the heretor liable. No 230. *Logan* contra *Glaſgow*, *February* 18. 1743.

Found it competent to creditors to object a nullity to an heretable bond, tho' the creditor had got an aſſignation to maills and duties from the debtor, of the ſame date with the heretable bond. No 272. *Competition Liddel with Dick*, *July* 20. 1744.

See No 62.

HORNING. Whether the word *apprize* in a horning is neceſſary, where it bears to poind and diſtrain, argued. No 14. *Competition Corrie with Muirhead*, *February* 13. 1736.

An application to direct letters of horning againſt a ſuperior, on a decreet of adjudication obtained before a ſheriff, upon a decreet *cognitionis cauſa*, refuſed. No 214. *King* contra *Hunter*, *December* 9. 1742.

HUSBAND AND WIFE. A conventional aliment granted by a husband during marriage, muſt be the rule in modifying his relict's aliment to the next term, unleſs, from the circumſtances of the eſtate, there is place for a larger. No 76. *Boſwal* contra *Boſwal*, *November* 18. 1737.

Found the relict intitled to the ſhare of the houſhold furniture, provided to her by her contract of marriage, heirſhip included. *Ibid.*

An obligation granted by a father to his ſon, in the ſon's contract of marriage, not conveyed to the wife, or the iſſue of the marriage, does not become void by the marriage diſſolving within year and day, without iſſue. No 132. *Hood* contra *Jack*, *November* 6. 1739.

One has no action againſt the repreſentatives of a husband for a debt of the wife's, if it is not conſtitute againſt the husband *ſtante matrimonio*, unleſs he prove the husband was *lucratus* by the marriage. No 147. *Drummond* contra *Stewart*, *February* 19. 1740.

See Bankrupt. No 273.

HYPOTHEC. In a declarator of recognition, the defender's writer was obliged to exhibit the writs of the lands in his cuſtody, notwithſtanding of his hypothec, which was *found* could not bar the third party's intereſt to have them produced, *per modum probationis*. No 82. *Earl of Sutherland* contra *Coupar*, *January* 31. 1738.

Workmen have no real right or preference to other creditors, on account of their reparations done to a houſe. No 3. *Competition Laurie with Burns*, *December* 3. 1735.

A *bona fide* purchaſer from a tenant, is not liable for the current year's rent, if enough was left at the time of the bargain to anſwer the ſame, tho' the maſter thereafter poinded what was ſo left for former arrears. No 28. *Rutherfurd* contra *Scot*, *June* 29. 1736.

The crop of one year is not hypothecated for the rent of the preceeding one, where the conventional terms of payment are poſtponed after the year's poſſeſſion. No 49. *Crawfurd* contra *Stewart*, *January* 21. 1737.

An offer of ſufficient ſecurity, or conſignation of bank notes in a ſheriff depute or clerk's hands, anſwers the hypothec, *currente termino*. *Ibid.*

I

IMPLIED CONDITION. If a father provide a child, and, failing it by deceaſe, ſubſtitute another, the condition *ſi ſine liberis deceſſerit* is implied. No 104. *Magiſtrates of Montroſe* contra *Robertſon*, *November* 21. 1738.

IMPLIED OBLIGATION. An indorſer having wrote to an indorſee, deſiring him to give the debtor in the bill the delay he demanded, and you'll loſe nothing by it: *Found* to imply an obligation to relieve the indorſee of all damages he might ſuſtain in delaying diligence. No 78. *M'Kenzie* contra *Somerville*, *January* 4. 1738.

IMPROBATION. Defenders allowed to prove poſſeſſion for 40 years backwards, before certification in an improbation. No 170. *Cumming* contra *Abercrombie*, *June* 9. 1742.

INDEFINITE PAYMENT made by a debtor to his creditor, found to impute to a debt he owed *alieno nomine*, and not to a debt on which arreſtment was uſed. No 133. *Forbes* contra *Innes*, *November* 9. 1739.

INFEFTMENT. Granted to the repreſentatives of a man named, is null, in ſo far as relates to the repreſentatives. No 157. *Competition Blackwood with the repreſentatives of Colvil*, *November* 7. 1741.

INDUCIAE LEGALES. A baron's decreet may be executed immediately, and needs not 15 days delay. No 5. *M'Queen* contra *Stirling*, *December* 18. 1735.

INHIBITION. An inhibiter who adjudged his debtor's eſtate on a ground of debt which did not bear annualrent, *found* intitled to his accumulations *retro* from the date of the inhibition. No 185. *Competition Dunbar with the creditors of Stewart*, *December* 3. 1741.

IRRITANCY, OB NON SOLUTUM CANONEM. *Found* not incurred by a vaſſal; it appearing by an inſtrument he had offered his feu-duties to the ſuperior, at the place where he lived; and that by a ſecond inſtrument the firſt was intimate to him. No 57. *Carruthers* contra *Johnſton*, *June* 18. 1737.

JURISDICTION. *Found* it not competent to the commiſſary of Hamilton to object to a confirmation before the commiſſary of Glaſgow. No 63. *Creditors of Tran* contra *Hamilton*, *June* 29. 1737.

A libel charging the defender with plundering boats in the high ſeas, *&c.* concluding for a fine and incapacity before the Admiral, may be tried without an aſſize. No 100. *Procurator-fiſcal of the high Court of Admiralty* contra *M'Kenzie*, *July* 21. 1738.

Action is not competent before Juſtices of the Peace, for demoliſhing pigeon-houſes, if the defenders have been ——— years in poſſeſſion. No 173. *Procurator-fiſcal of the Juſtices of Eaſt-Lothian* contra *Seaton*, *&c.* *June* 23. 1741.

Action for damages is competent before the Court of Seſſion *in prima inſtantia*, for debauching a man's wife. No 239. *Steedman* contra *Cooper*, *June* 17. 1743.

JUS ACRESCENDI. Legacy of houſehold furniture left to two equally and proportionally, one of them dying before the teſtator, his half of the furniture found not to accreſce to the other. No 166. *Paterſon* contra *Paterſon*, *June* 4. 1741.

Jus

JUS SUPERVENIENS. If a common debtor grants ſeveral infeftments on his eſtate before he is infeft, and thereafter takes infeftment; his creditors muſt be ranked thereon according to the priority of the dates of their infeftments. No 111. *Competition Neilſon with Murray, December* 22. 1738.

Jus ſuperveniens accreſces to ſucceſſors according to the dates of their infeftments. No 217. *Competition Paterſon with Kelly, December* 10. 1742.

K.

KIRK. Reparation of the kirk is no burden on the Titular of the teinds further than his valuation. No 85. *Heretors of Selkirk* contra *Duke of Roxburgh, February* 9. 1738.

KIRK-SESSION. Money voluntarily collected at a meeting of the Seceders, does not fall under the adminiſtration of the kirk-ſeſſion within whoſe bounds it was collected. No 119. *Hill* contra *Thompſon, June* 19. 1739.

L.

LEGACY. Of a bond of corroboration is derogated from, by a poſterior legacy of another bond which made part of the firſt. No 11. *Competition Hamilton with Grant, February* 6. 1736.

Legacy of twenty pound for a ſuit of mournings is preferable to other legacies of ſums of money, to the extent of the probable coſt of the ſuit. No 25. *Caldwall* contra *Caldwall, June* 24. 1736.

Legacy of all furniture and moveables belonging to the teſtator, in a certain houſe, does not convey the money, gold, bank-notes, and moveable bonds, lying by the defunct at his deceaſe in that houſe. No 53. *Cunningham* contra *Livingſtone, February* 18. 1737.

A legacy falls by the legator's predeceaſing the teſtator, even tho' there is annexed a general clauſe, and to their heirs and executors. No 166. *Paterſon* contra *Paterſon, June* 4. 1741.

Found that a teſtator receiving payment of a bill, which he had bequeathed to certain perſons, was a revocation of the legacies. No 205. *Jack* contra *Lauder, July* 27. 1742.

Orders to uplift certain ſums aſſigned for charitable purpoſes, not being executed, *found* not to import a revocation thereof. No 151. *Presbytery of Kirkcudbright* contra *Blair, June* 15. 1740.

LEGITIM. Though a father leaves his whole moveables to an only child with a ſubſtitution to another, yet the child's heir *in mobilibus* is preferable to the ſubſtitute *quoad* the legitim. No 190. *Robertſon* contra *Ker, June* 4. 1742.

LETTER OF CREDIT. It is not neceſſary to notify to a country gentleman, that furniſhings were made conform to his letter of credit. No 228. *Goodlet* contra *Lennox, February* 16. 1743.

LIFERENT. A liferentrix found entitled to the rents of a new houſe which came in place of an old one, to the extent of the ſum for which ſhe was creditor by her contract of marriage. No 189. *Competition Creditors of Mitchel with Warden, February* 9. 1742.

A ſum provided for the wife's liferent in a contract of marriage, is not attachable by the husband's creditors, unleſs caution is found to ſecure all her intereſt in the contract. No 240. *Crawfurd* contra *Mitchel, June* 22. 1743.

LIFERENTER. By reſervation, is entitled to cut *ſylvæ cæduæ* according to the cuſtom of the country where the woods grow. No 73. *Ferguſon* contra *Ferguſon, July* 26. 1737.

M.

MANSE. Vacant ſtipends are not ſubject, in the caſe of re-building a manſe, to be applied for that purpoſe. No 149. *Woodrow* contra *Cunningham, February* 26. 1740.

Repairing a manſe, not declared ſufficient at the miniſter's entry, upon whom the burden lies. *See* No 230

MINOR NON TENETUR PLACITARE. This brocard ſuſtained, and likewiſe found to be no ſufficient defence againſt a declarator of non-entry. No 268. *Douglas* contra *Inglis, June* 26. 1744.

If the brocard in this caſe was a good defence againſt redemption, argued. *Ibid.*

MISSIVE. Whether obligatory or not? *See* Obligation. No 87.

MUTUAL CONTRACT. The creditors of a husband who is unable to perform his part of a marriage-contract, have no right to ſue for implement of the preſtations incumbent on the wife's part. No 94. *Creditors of Watſon* contra *Cameron, June* 9. 1738.

N.

NEAREST OF KIN. A daughter, who renounces her father's ſucceſſion, cannot compete for the office of executor to him with the children of her brother *in familia*, the time of the renunciation. No 101. *Campbell* contra *Campbell, July* 21. 1738.

O.

OATH. The verity of a holograph note may be proved even after 20 years by the defender's oath, tho' an heir. No 177. *Brown* contra *Crawfurd, July* 17. 1741.

OBLIGATION. A lady having an intereſt in a pariſh, wrote to one of the heretors, impowering him to vote in her name, and ſign a call to a certain perſon to be miniſter; adding, upon doing whereof, and what elſe is neceſſary for me, I oblige me to hold as ſufficient as if I had done ſo myſelf; *found* not to ſubject her in any ſhare of the expences of that ſettlement. No 87. *Paterſon* contra *Houſton, February* 15. 1738.

One having wrote to his friend, informing him that he intended to ſink ſo much money for an annuity, adding, "if you'll take it, and "I die before a certain time, you'll be a gain-"er; and if I live longer, aſſure yourſelf, I "ſhall make it good one time or other to ſome "of your's." *Found*, that he was not bound to make good or repeat the annuities over and above the principal ſum and intereſt thereof. No 152. *Gordon* contra *Cunningham, June* 16. 1740.

OFFICE. If adjudgeable. *See* Adjudication. No 68.

P.

PACTUM ILLICITUM. An obligement to ſell lands at a certain price, adjected to a loan of money, found *contra bonos mores*. No 29. *Brown* contra *Muir, June* 24. 1736.

No action lies for damages on account of the not-delivery of goods ſold, if the buyer knew at the time of the ſale that they were prohibited or run. No 34. *Scougal* contra *Gilchriſt, November* 16. 1736.

Action is competent on a bill granted for prohibited goods. No 155. *Wilkie* contra *M'Neil, November* 6. 1740.

No action lies for damages, on account of the not delivery of run-goods, if the buyer knew them to be such at the time of the bargain. No 180. *Cockburn* contra *Grants*, *November* 11. 1741.

Paction betwixt private parties to dispense with the statutory regulations of cruives, is invalid, tho' acquiesced in for upwards of forty years. No 244. *Fullarton* contra *Scot*, *July* 7. 1743.

Bill granted by a man to a woman, supposed to be *factum pudicitiæ*, but which she alledged was granted as an inducement to marry him, sustained. No 195. *Provan* contra *Calder*, &c. *June* 17. 1742.

PAPIST. The objection to an adjudication, that it proceeded on bills, &c. granted in England, by the common debtor, a papist, and therefore null, upon the 26th act, Parl. 1695, repelled. No 115. *Sidney* contra *Maxwell*, *February* 14. 1739.

PASSIVE TITLE. A son possessing an estate without making up any title thereto, is not liable to his father's creditors, upon the act 1695, the father having died in a state of apparency, after being more than three years in possession. No 6. *Sinclair* contra *Sinclair*, *January* 8. 1736.

An apparent heir's intromission with rents falling due, during the apparency of one who was three years in possession, but to whom he renounced to be heir, does not infer a passive title, but makes him only liable *in valorem*. No 186. *Leith* contra *Lord Banff*, *December* 9. 1741.

Found, That by the conception of a disposition, the disponee was not obliged to pay the debts of the granter, beyond the value of the subjects disponed, tho' he omitted to confirm and inventary the same. No 269. *Executors of Murray* contra *Murray*, *July* 5. 1744.

PASSIVE TITLE OF LUCRATIVE SUCCESSOR. Daughters are not liable *in valorem*, of the sums contained in their bonds of provision, if they have not got payment thereof out of their father's estate. No 23. *M'Brair* contra *Maitlands*, *February* 19. 1736.

PAYMENT BEFORE HAND. Rent paid by a tenant to his master, conform to orders before the conventional terms, but after the legal ones, and before interpellation by process, liberates him in a question with creditors. No 16. *Annuitants of the York-building Company* contra *Garden*, *February* 17. 1736.

PENALTY. If a conventional penalty is wholly incurred, where there is only a particular or temporary failure, argued. No 220. *Arnot* contra *Arnot*, *December* 20. 1742.

PERICULUM. A tacksman is not bound to repair damage done to houses, occasioned by an extraordinary hurricane, tho' he oblige himself to put the houses in repair, keep them so, and receives a sum certain on that account. No 168. *Annuitants of the York-building Company* contra *Adams*, *June* 5. 1741.

The hazard of a subject sold lies on the buyer after sale. No 270. *M'Donald* contra *Hutchison*, *July* 6. 1744.

PERSONAL OBJECTION. A lawyer and trustee cannot object to the form of a bill, granted by him to the person who trusted him. No 251. *Garden* contra *Rigg*, *November* 26. 1743.

PERSONAL AND TRANSMISSIBLE. Moveables and bonds, (burdened with the payment of legacies) being disponed to one for his aliment, and declared not affectable by his creditors, the residue thereof, after paying the legacies, *found* not affectable by arrestment, for debts prior to the disposition. No 109. *Urquhart* &c. contra *Forbes*, *December* 19. 1739.

PERSONAL AND REAL. Land conveyed in a contract of marriage, with the burden of debts, as contained in a particular list and inventary, but which was neither expressed in the contract, nor registrate in the register of sasines and reversions, does not render the debts a real burden upon the lands conveyed. No 120. *Competition Gordon with the creditors of Douglas*, *June* 20. 1739.

PLANTING AND INCLOSING. One is not liable for half the expences of a march-dyke, if no requisition was made to concur, previous to the building. No 91. *Ord* contra *Wright*, *February* 23. 1738.

The act 41st, Parl. 1661, burdening the heretors of the adjacent ground with the half of the march-dyke, does dot reach feuars, who have not above five or six acres. No 123. *Penman* contra *Douglas*, *July* 3. 1739.

Fruit-trees found to fall under the acts of Parliament for preservation of planting. No 248. *Robertson* contra *Robertson*, *July* 24. 1743.

POSSESSORY JUDGMENT. To whom competent. *See* No 103. page 156.

PRESCRIPTION. Sustained against a bond, the pursuer having libelled on a bad title, tho' he had a separate and distinct one to the debt. No 4. *Blair* contra *Sutherland*, *December* 9. 1735.

A cautionary obligement for another's debt, *found* to be prescribed, the debts due by the principal debtor being extinguished by prescription. No 10. *Haliburtons* contra *Graham*, *February* 6. 1736.

The right of redeeming a temporary reversion, *in græmio juris*, prescribes by the lapse of 40 years, tho' no decreet of declarator of the irritancy has been obtained. No 103. *Pollock* contra *Storrie*. *November* 10. 1738.

A bond of tailzie which has been latent for upwards of 40 years, cannot be set up as a title for evicting an estate from those who have possessed the same for upwards of 40 years, upon a disposition and infestment following thereon. No 126. *M'Dougal* contra *M'Dougal*, *July* 10. 1739.

Found the pursuers minority did not interrupt the prescription, they being only substitutes by that tailzie, and the right thereof not having devolved on them during their minority. *Ibid.*

The latent tailzie found not available against onerous provisions, in a contract of marriage in favours of the husband, and the heirs male of the marriage. *Ibid.*

A retour that had stood unquarrelled, not only for 20, but for 40 years, sustained, tho' objected to as proceeding *ex facie*, on a reason that was inept and ineffectual. No 188. *Ayton* contra *Alison*, *February* 5. 1742.

PRESCRIPTION VICENNIAL. Of Bills, argued. *See* No 208.

PRESCRIPTION DECENNIAL. A tutrix nominate, is intitled to the benefit of the decennial prescription, tho' she did not regularly establish the office in her person, or make up inventaries conform to law. No 8. *Mercer* contra *Irvine*, *January* 20. 1736.

PRESCRIPTION SEPTENNIAL. One having become

come bound as cautioner, in a bond of presentation, to present the person of another against a day certain, otherways to pay the debt, *found* not intitled to the benefit of the prescription, introduced by the act 1695. No 39. *Robertson* contra *M'Inlay*, *December* 3. 1736.

Charge by a town-officer to a cautioner in a bond, within seven years of the date thereof, interrupts the septennial prescription, founded on the act 1695. No 95. *Rowand* contra *Lang*, *June* 13. 1738.

In an action on a bond, in which one received the money, and another bound with him conjunctly and severally in payment, the defence of the septennial prescription was repelled. No 201. *Burnet* contra *Middleton*, *June* 29. 1742.

One having granted an obligation to another, declaring, that as it was at his desire the other had lent money by bond to a third party, therefore he obliged himself, that the debtor in the bond should pay it, else to pay it himself, *found* not intitled to the benefit of the act 1695. No 212. *Caves* contra *Spence*, *December* 3. 1742.

PRESCRIPTION TRIENNIAL. A process for servants wages, *found* only to interrupt the prescription, as to what fees fell due within three years of the commencement thereof. No 32. *Douglas* contra *Duke of Argyle*, *July* 22. 1736.

The triennial prescription of servants wages, runs during the *annus deliberandi*. *Ibid.*

Aliment of a minor falls under the triennial prescription; and a bond granted by a curator therefor, after the curatory expired, does not prove that the aliment was resting. No 135. *Davidson* contra *Watson*, *November* 16. 1739.

The triennial prescription does not operate against one who is neither writer, agent, or merchant, claiming payment of an accompt of money he had advanced for a friend. No 147. *Drummond* contra *Stewart*, *February* 19. 1740.

Furnishings to an heir *cum beneficio*, does not preserve an accompt furnished to the defunct from prescription. No 172. *Competition Kennedy with the creditors of Crichen*, *June* 23. 1741.

PRESUMPTION. The values in a confirmed testament is the presumed value of goods abstracted, unless otherwise proven. No 26. *Monro* contra *Monro*, *June* 25. 1736.

Aliment furnished by a father to an infant son, presumed to be furnished *ex pietate*, and therefore could not compensate any claim he had against his father. No 27. *Vanse* contra *Vanse*, *June* 29. 1736.

A husband having obliged himself to provide 12000 merks to the children of the marriage, declaring the same to be in full satisfaction of all they could claim from him, excepting what he should give of his own free will; and the eldest son having succeeded to his father's estate, by a disposition from him, proceeding on love and favour, the son's share of the said sum was *found* satisfied, and extinguished. No 145. *Pringle* contra *Pringle*, *February* 8. 1740.

If a father is bound in his contract of marriage, to provide a certain sum to the heirs or bairns of that marriage, his giving a sum to one of his daughters, will not be presumed to be given as a *præcipuum*. No 56. *Stenhouse* contra *Young*, *June* 15. 1737.

See Legacy. No 205, and No 151.

PRISONER. One liberate on the act of grace, may be recommitted for a debt contracted posterior to his liberation. No 89. *Gordon* contra *Magistrates of Edinburgh*, *February* 21. 1738.

PROCESS. An objection to a witness repelled, in respect no particular reprobator was protested for, but only reprobators against the witnesses in general. No 46. *Wright* contra *Din*, *January* 5. 1737.

A pursuer having made his election, and examined witnesses, cannot recur to the oath of party. No 75. *M'Brair* contra *Robertson*, *November* 18. 1737.

Substituting a new sheet upon a summons, in place of an old one, without authority, makes the instance perish. No 45. *Sutherland* contra *Dunbars*, *December* 17. 1736.

One may mend his libel, tho' the days of compearance are wrong filled up, if the *induciæ* are elapsed before calling the cause. No 83. *Ochterlony* contra *M'Kenzie*, *February* 7 1738.

A party is not obliged to confess or deny, in terms of the act of sederunt, February 18. 1716. where the subject claimed is an accompt prescribed *quoad modum probandi*. No 92. *Dick* contra *Aiton*, *February* 24. 1738.

A libel at the instance of the feuars of Orkney, charging several injuries not connected, *found* not competent at the instance of so many pursuers; but the process allowed to proceed at the instance of any one of them. No 167. *Gray* contra *Stewart*, *June* 5. 1741.

Libel founded on the act Geo. I. intituled to prevent tumults, concluding against magistrates instead of the burrow, sustained. No 224. *Straton* contra *Magistrates of Montrose*, *January* 28. 1743.

See Improbation. No 170.

See Execution. No 271.

PROOF. Expressions that imply a challenge to fight, are probable by oath, if the libel is restricted to a pecuniary mulct. No 5. *Procurator-fiscal of Edinburgh* contra *Campbell*, *January* 2. 1736, page 13.

In a reduction of a note granted for the price of a watch, *found* no necessity to prove the identity, in respect the watch was produced. No 77. *Sutherland* contra *Lady Kinminity*, *November* 22. 1737.

An arrestee may prove any ground of compensation by the common debtor's oath, tho' bankrupt, that was liquid before laying on the arrestment. No 40. *Creditors of Moonie* contra *Broomfield*, *December* 3. 1736.

It is not competent to prove by witnesses, that a bill was accepted for money lost at game, against an onerous indorsee, who was not privy to the wrong. No 163. *Stewart* contra *Hislop*, *February* 18. 1741.

It is competent to prove by the winner, or his trustee, that a bill was granted for money lost at game, even against onerous assignees. No 156. *Pringle* contra *Biggar*, *November* 7. 1740.

The importation of Irish victual is probable by oath of party. No 193. *Hamilton* contra *Boyd*, *June* 16. 1742.

Granting and depositing a bill probable by witnesses. See *Pactum illicitum*. No 195.

It is not competent to prove by witnesses the delivery of a watch, *&c.* worth L. 30 sterling, in order to take away the effect of a former donation of the same subject, constitute by writ, and create a new legacy thereof. No 206. *Whitefoord* contra *Ayton*, *November* 3. 1742.

Concert betwixt a debtor and his creditors, that they should accept certain effects in full satisfaction, is competent to be proven by witnesses. No 261. *Mackilhose* contra *Reid*, *February* 24. 1744.

Proof relevant to support a null bill. *See* Writ. No 130.

PROCURATOR-FISCAL. May purſue a riot or injury, without the concourſe of the injured party, tho' the ſame can only be proved by oath of party. No 5. *Procurator-fiſcal of Edinburgh* contra *Campbell, January* 2. 1736, page 13.

Procuraror fiſcal in a Commiſſary-court, whether he can proſecute a verbal injury, tho' the parties injured diſclaim. See No 52. *Procurator of the Commiſſary-court of Kelſo* contra *Chatto, February* 11. 1737.

PROMISSORY-NOTE. Is arreſtable, tho' it is indorſed for value. No 113. *Competition Forbes with Innes, February* 2. 1739.

PROPEERTY. One cannot build a dam-dyke acroſs a river, ſo as to make the water regorge to the prejudice of a neighbour's mill, even tho' he is willing to pay the expence of altering the mill, in order to remove the hurt ariſing from the reſtagnation. No 265. *Fairly* contra *Earl of Eglington, June* 5. 1744.

PROVISION TO HEIRS AND CHILDREN. Clauſe in a contract of marriage, to the heirs or bairns of the marriage, intitles all the children to come in *per capita*. No 17. *Rankin* contra *Rankin, February* 17. 1736.

Clauſe in a contract of marriage, providing two thirds of the houſhold pleniſhing, in certain events to the wife's children, *nominatim* of a former marriage, *found* to import only a deſtination of ſucceſſion, and that the ſame was alterable. No 99. *Tait* contra *Pollock, July* 20. 1738.

A bond of proviſion granted by an elder brother to his father, obliging himſelf to provide his younger brothers and ſiſters, *found* not alterable, in reſpect there was no power therein to alter, or vary the proportions ſettled by it. No 160. *Competition Hamilton with Hamilton, January* 9. 1741.

Clauſe in a contract of marriage, providing to the huſband and wife, during their lifetime, the yearly annualrent of a certain ſum, and the fee thereof to the bairns of the marriage, *found* not to intitle a child of that marriage to compete with the father's creditors upon that proviſion. No 178. *Competition creditors of Lockhart with Lockhart, July* 31. 1741.

An eſtate provided to the heirs of a marriage, diſables the husband from entailing the ſame, to the excluſion of an heir of the marriage. No 234. *Graham* contra *Coltrain, June* 9. 1743.

A proviſion by a father to daughters, and heirs female, intitles the daughters to the proviſion, tho' the father had a ſon who ſurvived him, and ſucceeded to the eſtate. No 237. *Competition creditors of Redhouſe with Gloſs, June* 15. 1743.

Q

QUALIFIED OATH. The price of ſome ſheep being referred to the defender's oath, he acknowledged the bargain, but added, that ſometime after the purſuer ordered him to pay the price to another, which he did accordingly, this quality *found* intrinſic. No 47. *Muffat* contra *Moffat, January* 13. 1737.

In a purſuit at an executor's inſtance for borrowed money, for which no written document had been taken, the defender declared, that he never borrowed the money but on the expreſs condition of repaying the ſame, only in caſe the creditor ſhould ask it in his own lifetime, this quality *found* intrinſic. No 71. *Meikle* contra *Tennant, July* 26. 1737.

Oath whether it proved reſting owing. *See* No 208. *Lady Forreſter* contra *Lord Elphinſton November* 13. 1742.

R

RECOURSE. *See* Bills of Exchange. No 54.

REGISTRATION. *See* No 253.

REMOVING. Warning, if neceſſary, when tenants have obliged themſelves to remove at the iſſue of the tack, without any warning, or legal intimation made to them, or proceſs of law againſt them. *See* No 20. *Dickſon* contra *Tweedie, February* 18. 1736.

A tenant overgiving a houſe within a burgh of barony, 40 days preceeding Whitſunday, is ſufficient, altho' by the univerſal cuſtom of the burgh, it is always done upon the firſt Monday of the year. No 31. *Nicol* contra *Groſſat, July* 16. 1736.

One being warned in December, to remove from a park, garden, *&c.* at the Candlemas, and from the manſion-houſe, *&c.* at the Whitſunday thereafter. The objection was ſuſtained, that he not being warned 40 days before Whitſunday, preceeding Candlemas, he could not be obliged to remove at that term. No 146. *Hay* contra *Carſe, February* 19. 1740.

A verbal promiſe not to remove a tenant as long as he paid the yearly tack-duty, is not relevant for more than one year. No 187. *Lord Braco* contra *Innes, January* 15. 1742.

It is not neceſſary to warn a ſubtenant who poſſeſſes under a tackſman, whoſe leaſe excludes aſſignees, nor to ſummon him to remove on ſix days. No 232. *Earl of Marchmont* contra *Fleming, February* 22. 1743.

A promiſe made by a tenant, who poſſeſſes by tacit relocation, to remove at the next enſuing term, while it was competent to the maſter to uſe a formal warning, and not reſiled from till the term day, when no warning could be uſed, is binding on the tenant. No 274. *Edmonſton* contra *Bryſons, July* 28. 1744.

REPARATION. One who is bound with another to leave a houſe in the ſame condition he received it, is liable, if it is burnt by the other's fault. No 43. *Sutherland* contra *Robertſon, December* 14. 1736.

No diligence can proceed againſt the effects falling under a huſband's *jus mariti*, upon a decreet recovered againſt the wife for a verbal injury, condemning her in a certain ſum. No 105. *Gordon* contra *Pain, December* 5. 1738.

No action lies on the ſtatute Geo. I. intituled to prevent tumults, *&c.* for damage ariſing for carrying off grain, &c. out of any houſe, but only for the damage done by pulling down the houſe. No 224. *Straton* contra *Magiſtrates of Montroſe, January* 28 1743.

REPROBATOR. *See* Proceſs. No 46.

RESIGNATION. *See* Saſine. No 199.

RETENTION. If good againſt an arreſter where the debtor is bankrupt, untill caution is found, argued. No 216. *Creditors of Paterſon* contra *M'Aulay, December* 9. 1742.

See Compenſation. No 2.

RETOUR. *See* Preſcription. No 188.

RETURN CLAUSE OF. A legacy may be gratuitouſly aſſigned, notwithſtanding a clauſe of return, if the legator ſurvive the term of payment. No 13. *Lewis* contra *Lawrie, February* 13. 1736.

S

SALE. One ſelling *procuratorio nomine*, is only bound to produce his commiſſion, if the goods are

are not delivered. No 88. *Rankin* contra *Moliſon*, *February* 17. 1738.

A purchaſer of lands at a voluntary roup, is not liable to a creditor arreſting the price, if he proves the purchaſe was made on account of the ſeller. No 222. *Watſon* contra *Maule*, *January* 19. 1743.

SANCTUARY. It is lawful for the bailie of the Abbey, to grant warrant to ſeize and ſearch perſons in the Abbey, if not booked in his books. No 171. *Hamilton* contra *Haliburton*, *June* 12. 1741.

SASINE. The objection to a ſaſine, that it proceeded on a precept to infeft in lands, as the ſame are particularly enumerate in the debtor's rights, ſuſtained. No 198. *Competition Wallace with Dalrymple*, *June* 23. 1742.

The objection to a ſaſine, that it proceeded on a reſignation, not made with ſtaff and baſtion, in terms of the act of ſederunt 1708, ſuſtained. No 199. *Competition Earl of Aberdeen with Duncan*, *June* 25. 1742.

Objections to a ſaſine: 1*mo*, That the precept gave a warrant to give ſaſine of one thing, and ſaſine was actually given of another thing. 2*do*, That the ſaſine was not regiſtrated, conform to the act 1617, repelled. No 253. *M'Kenzie* contra *Buchanan*, *December* 21. 1743.

SERVICE OF HEIRS. An heir found intitled to the ſuperplus price of an eſtate ſold judicially, after paying the creditors, he making up a real right to the lands. No 204. *Stirling* contra *Cameron*, *July* 21. 1742.

A ſervice as heir general, will not carry ſubjects falling to heirs of proviſion, tho' both characters coincide in the ſame perſon. No 207. *Competition Cairns with the creditors of Garrioch*, *November* 12. 1742.

SERVITUDE. A vaſſal taking a charter from the ſuperior, containing a clauſe not to build on a yard, nor hurt the lights of another, upon which ſaſine followed, *found* ſufficient to conſtitute the ſervitude, and that it could not be reſtricted by a marginal note in the diſpoſition upon which the charter proceeded. No 116. *Cleland* contra *M'Kenzie*, *February* 21. 1739.

STEELBOW. *See* No 50.

STIPEND. A charge on a decreet of modification and locality, cannot be ſuſpended but on conſignation. No 153. *Garrock* contra *Scot*, *July* 22. 1740.

SOLIDUM ET PRO RATA. In a ſociety of three, one of the partners was *found* liable to the other for the profits of his third ſhare, tho' it was pled, that he was not liable for the loſs ariſing from the inſolvency of the third partner. No 192. *Ramſay* contra *Balfour*, *June* 10. 1742.

SUMMONS. *See* Proceſs. No 45.

SUPERIOR AND VASSAL. A ſuperiority cannot be divided without conſent of the vaſſal. No 169. *Maxwell* contra *M'Millan*, *June* 9. 1741.

T

TACK. Tackſmen bound to pay the rent free of certain burdens particularly ſpecified, and other deductions whatſoever, does not preclude them from getting allowance of feu-duties, and ground annuals, which they had paid. No 72. *Annuitants of the York-building Company* contra *Grant*, *July* 26. 1737.

A tackſman is not liable for the ſubtack-duty, who has renounced the benefit of warning, tho' he uplift the ſame after the iſh, if no notice is given him to remove. No 211. *Competition Bartelet with Stewart*, *December* 2. 1742.

Tenants who reap no more than the expence of ſeed and labour, are not liable in rent. No 213. *Earl of Eglington* contra *his Tenants*, *December* 3. 1742.

TAILZIE. One who entered into a minute of ſale of lands with another, whoſe right was entailed, tho' not recorded, *found* not bound to accept of the bargain. No 202. *Johnſton* contra *Lockhart*, *July* 13. 1742.

The ſame point determined. *See* No 252. *Maxwell* contra *Tait*, *December* 20. 1743.

If a tailzie does not contain a ſpecial proviſion, voiding debts to be contracted, they will affect the eſtate. No 247. *Gardner* contra *heirs of Dunnipace*, *January* 27. 1744.

N. B. This deciſion ſhould have been No 257.

An heir of entail is not liable for mournings, or an interim aliment to the widow of a preceeding heir, unleſs the ſame is authoriſed by the entail. No 258. *Lauder* contra *Baird*, *January* 31. 1744.

Debts contracted by an heir of entail, in whoſe ſaſine the irritant, *&c.* clauſes, were not *verbatim* repeated, otherwiſe than by a general reference to the conditions mentioned in the bond of tailzie, will affect the eſtate. No 269. *Executors-creditors of Murray* contra *Murray*, *July* 5. 1744.

Wadſet purchaſed by an heir of tailzie, the reverſion of which made part of the entailed eſtate, is affectable for his debts. No 9. *Earl of Peterborrow* contra *creditors of Fraſer*, *February* 4. 1736.

TEINDS. *See* Heritage and Conqueſt. No 44.

TITLE TO PURSUE. An adjudication without infeftment or charge, *found* a good title to carry on a ſale of bankrupt lands. No 83. *Ochterlony* contra *M'Kenzie*, *February* 7. 1738.

TUTOR AND PUPIL. An agreement to give a fit man a gratuity for undertaking the office of tutor, becauſe the neareſt friends declined meddling, does not bind the pupil. No 22. *Scot* contra *Strachan*, *February* 19. 1736.

A tutor teſtamentar preferred to a mother as to the cuſtody of her own child, to which ſhe was intitled by her husband's will, in reſpect of her ſecond marriage, tho' the tutor was next in ſucceſſion. No 33. *M'Ilvain* contra *MacQuhirter*, *July* 30. 1736.

Intromitters with a defunct's effects, *found* liable to account to his children as tutors or protutors. No 127. *Campbell* contra *Fowler*, *July* 19. 1739.

If the diet of a brief of tutory is once deſerted, can the ſame brief be of new executed to another diet, argued. No 225. *Sutherland* contra *Grant*, *January* — 1743.

U

USURY. Taking annualrents on a bond before hand, or before it was due, *found* to be no ſufficient evidence of uſury, ſo as to annul the bond. No 176. *Cleland* contra *Hamilton*, *July* 15. 1741.

V

VAGRANTS. No action *found* to ly at the inſtance of one kirk-ſeſſion againſt another, for maintaining a child expoſed in the purſuer's pariſh, tho' the mother had reſided many years in the defender's pariſh. No 65. *Kirk-ſeſſion of*

Inverese contra *kirkseſſion of Tranent*, *June* 29. 1737.

VERITAS CONVICII. *See* No 105.

VIRTUAL. A creditor whoſe right is preferable on his debtor's lands, conſenting to a ſale of part thereof, tho' the ſeller is taken bound in the ſame deed to procure a ratification of the ſale from the conſenter, *found* to import no more than a *non repugnantia*. No 129. *Buchan* contra *Cockburn*, *July* 24. 1739.

W

WARRANDICE. An infeftment of warrandice *found* to give a real right in the warrandice lands, not only to the extent of the value of the principal lands at the time of eviction, but to all the purſuer's damages, ariſing before or after the eviction, without any fault in the purſuer. No 179. *Blair* contra *Hunter*, *November* 6. 1741

WRECK. Whales do not come under a grant of wreck. No 118. *Competition Home with the Admiral-depute*, *June* 5. 1739.

WITNESS. A defender in one court can be adduced by a purſuer in another court, as a witneſs to prove the ſame allegations. No 5. *Procurator-fiſcal of Edinburgh* contra *Campbell*, *January* 2. 1736. page 13.

A ſiſter and aunt to a woman, are admitted *cum nota* in proving her marriage, tho' it is to be eſtabliſhed chiefly from circumſtances. No 107. *Young* contra *Arrot*, *December* 8. 1738.

The Advocate and agent for a defender rejected, tho' adduced by him to prove a communing, where none elſe were ſaid to be preſent. No 242. *Adams* contra *Lord Braco*, *July* 6. 1743.

Objection to witneſſes, that one is lawyer, and the other agent for the adducer, is good, tho' the knowledge of the facts they were to be examined upon, preceeded the period of their being employed. No 245. *Lindſay* contra *Hunter*, *July* 12. 1743.

The agent's clerk admitted as a witneſs, being the writer of the deed under reduction. *Ibid.*

A wife is an inhabile witneſs againſt her huſband in a civil cauſe. No 255. *Campbell* contra *Crawfurd*, *January* 5. 1744.

A witneſs may be examined on interrogatories, tho' his anſwers may involve himſelf in a malverſation in his office. No 260. *Murray* contra *his grandfather's truſtees*, *February* 21. 1744.

Creditors obliging themſelves to be at the expence of defending a proceſs if habile witneſſes. *See* No 261. *Mackilhoſe* contra *Reid*, *February* 24. 1744.

WRIT. A decreet-arbitral is a complete deed from the moment it is execute, without the neceſſity of delivery. No 41. *Simpſon* contra *Strachan*, *December* 10. 1736.

Deed ſupported, tho' one of the witneſſes was only deſigned Eſquire. *See* Homologation. No 38.

The informality of a ſubſcription by one notary, and two witneſſes, to a contract of importance, may be ſupplied by the party's oath. No 124. *Coriòie* contra *Shiel*, *July* 6. 1739.

Objections to a bond, that the writer was not deſigned before inſerting the witneſſes. *2dly*, That he was not deſigned with certainty, repelled. No 128. *Ewing* contra *Semple*, *July* 20. 1739.

A null bill may be ſupported by a proof by witneſſes, that the money was paid to the accepter. No 130. *Inglis* contra *Wiſeman*, *July* 27. 1739.

The objection to the teſting clauſe of an aſſignation, that the perſons who ſigned witneſſes were not ſaid to be witneſſes in the body of the writ, repelled. No 161. *Doig* contra *Ker*, *January* 9. 1741.

The verity of a preſcribed note, probable by the defender's oath, tho' an heir. *See* Oath. No 177.

Objection to a teſtament, conſiſting of one ſheet, that in the end of the laſt page it did not mention how many pages were therein contained, as required by the act 15. 1696, repelled. No 190. *Robertſon* contra *Ker*, *February* 4. 1742.

Objection to a holograph bond, conſiſting of three pages, that it was only ſigned on the laſt page, repelled. No 219. *Williamſon* contra *Williamſon*, *December* 12. 1742.

Diſcharge *found* not to require ſtamped paper. No 238. *Chryſtie* contra *Trail*, *June* 17. 1743.

WRIT PRIVILEGED. A letter wrote to a country gentleman, informing him, that ſuch a one wanted 100 bolls bear; adding, that he might deal ſafely with him, and if they agreed, he would ſee the gentleman paid, if it were for 500 bolls, *found* obligatory, tho' not holograph. No 137. *Goodlet* contra *Lennox*, *December* 12. 1739.

WRONGOUS IMPRISONMENT. A judge having granted a warrant againſt a perſon, whereon he was incarcerated on an information, that he had clandeſtinely carried away another from his family, and likewiſe prevailed on him to carry off ſeveral writs of his eſtate, *found* not to fall under the act 1701, No 37. *Campbell* contra *Ramſay*, *November* 26. 1736.

The penalties in the act 1701, anent wrongous impriſonment, reacheth other perſons than magiſtrates, or officers of the law. No 42. *Paterſon* contra *Anderſon*, *December* 14. 1736.

See Forgery. No 55.

FINIS.